

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DENNIS P. RIVERO, M.D.,

Plaintiff,

VS.

NO. CV 16-0318 JB

BOARD OF REGENTS OF THE
UNIVERSITY OF NEW MEXICO,

Defendant.

Transcript of Motion Proceedings before
The Honorable James O. Browning, United States
District Judge, Albuquerque, Bernalillo County,
New Mexico, commencing on June 26, 2018.

For the Plaintiff: Mr. Eric Norvell

For the Defendant: Mr. Lawrence Marcus; Ms. Emma
Rodriguez

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1 THE COURT: Good morning everyone. I
2 appreciate everyone making themselves available to me
3 this morning.

4 All right. The Court will call Dennis P.
5 Rivero, M.D. versus Board of Regents of the
6 University of New Mexico, Civil Matter No, 16-0318
7 JB/SCY.

8 If counsel will enter their appearances for
9 the plaintiff.

10 MR. NORVELL: Eric Norvell for Dr. Dennis
11 Rivero, who is here today, Your Honor.

12 THE COURT: All right. Mr. Norvell, Dr.
13 Rivero, good morning to you.

14 And for the defendant.

15 MR. MARCUS: Lawrence Marcus, your Honor.
16 And with me is Emma Rodriguez for the Board of
17 Regents for the University of New Mexico.

18 THE COURT: Mr. Marcus, good morning to
19 you. And what is your name?

20 MS. RODRIGUEZ: Emma Rodriguez, Your Honor.

21 THE COURT: Ms. Rodriguez, good morning to
22 you.

23 All right. We're here on a number of
24 motions which have a number of issues. So unless
25 somebody wants to introduce the issues we have today

1 a different way, I was going to suggest we just start
2 with the motion for summary judgment. What I was
3 going to propose is each one of you sort of make a
4 little bit of an opening statement, and then let's
5 take these one issue at a time. But if somebody
6 wants to do something different, we can do that.

7 Mr. Marcus, it's your motion, if you wish
8 to argue in support of it.

9 MR. MARCUS: Thank you, Your Honor.

10 THE COURT: Mr. Marcus.

11 MR. MARCUS: This case concerns a former
12 surgeon at UNM, who admitted was a technically
13 proficient surgeon, but he had some issues with his
14 professionalism, some serious issues with his
15 professionalism and his interaction with patients,
16 nurses, and other members of the medical staff.

17 And he had left. Dr. Rivero, the
18 plaintiff, had left UNM while these issues were
19 becoming more severe, which I will get into later.
20 This is a quick opening statement, so I assume you
21 don't want me to get into too much detail. But he
22 left UNM, although he stayed -- he kept a .05
23 full-time equivalent at UNM after he moved to
24 Oklahoma. But he came back one day a month to assist
25 with various surgeries that UNM needed his help with.

1 He wanted to come back full-time, but then
2 the issues of his professionalism became a much
3 bigger problem. Because if he was only there one day
4 a month, he wasn't running into the same problems
5 that he would have run into had he been full-time.
6 So when he wanted to come back full-time this raised
7 some issues. And these professionalism issues caused
8 many meetings of the UNM, many members of the UNM
9 medical staff to have some serious reservations about
10 allowing him to come back full-time.

11 As a result, Dr. -- this went on for a few
12 years, a few years after he first attempted to come
13 back full-time. Dr. Rivero met with Dr. Schenck to
14 try to come up with some sort of compromise, some
15 sort of method of resolving his professionalism
16 issues. And Dr. Schenck and Dr. Rivero came to this
17 agreement that Dr. Rivero would have -- Dr. Schenck
18 is the chair of the orthopedics department, so it
19 was -- so he was very much involved with these
20 issues. Dr. Schenck and Dr. Rivero agreed that the
21 plaintiff would attend four counseling sessions. And
22 Dr. Rivero contacted a psychiatrist at UNM to set up
23 these counseling sessions. This agreement was
24 memorialized with an addendum, which Dr. Rivero was
25 to attend a four-part psychiatric evaluation. And

1 Dr. Rivero refused to sign this addendum because he
2 felt this was -- even though it was basically what he
3 had agreed to, he refused to sign it because he felt
4 that it was a medical inquiry that was barred by the
5 Rehabilitation Act.

6 And after he refused to sign it, he then
7 attempted to get his records. And he continued to
8 get -- he continued to work at UNM for the next three
9 years after that, while he was attempting to get the
10 records. When he finally received all -- what
11 appeared to be all of his records, he then quit, and
12 claimed that he was constructively discharged,
13 despite the fact that he had been working at UNM for
14 three years with no problems. And he had been
15 working for one day a month, actually go back to
16 seven years, he'd been working one day a month for
17 seven years, and no one gave him any problems
18 whatsoever, he claimed that he was constructively
19 discharged.

20 Dr. Rivero brought the lawsuit as a result.
21 In this lawsuit he accuses UNM of requiring him to
22 undergo medical inquiry that was not permitted by the
23 Rehabilitation Act, and also that he was
24 constructively discharged when he quote/unquote
25 discovered that UNM didn't have any reason, in his

1 mind, in his subjective interpretation of his records
2 he felt that UNM did not have any reason to require
3 this inquiry.

4 Plaintiff's lawsuit has several major
5 issues, which I will get into in more detail later.
6 The first cause of action for his illegal medical
7 inquiry, for the allegedly illegal medical inquiry
8 was -- is barred by the statute of limitations
9 because he received the addendum, requesting that he
10 submit this inquiry as a condition of having his
11 hours raised. He received this addendum in 2011, and
12 did not bring the litigation until 2016. So there is
13 a three-year statute of limitations. It's completely
14 time barred, Your Honor.

15 In addition, the allegedly illegal medical
16 inquiry was not actually illegal, because it was job
17 related and consistent with business necessity. This
18 was an attempt to have plaintiff resolve his issues
19 with professionalism.

20 Regarding his claim for constructive
21 discharge, plaintiff was never deemed to have a
22 disability, and that's a prerequisite for any claim
23 for constructive discharge under the Rehabilitation
24 Act. You can't be discriminating against a person
25 with disability if you don't believe -- the person

1 doesn't have a disability -- which he doesn't -- and
2 if the person doesn't -- if the person isn't deemed
3 to have disability. And UNM never deemed him to have
4 a disability.

5 And secondly, plaintiff was never
6 constructively discharged. He did not have -- there
7 was no harassment of any sort. He came to UNM every
8 month, one day a month. He continued to work. His
9 work continued to be valued by UNM. And no one ever
10 gave him any problems. A constructive discharge is
11 when your actual working conditions are so
12 intolerable that you can't bear to attend work
13 anymore, you can't bear to come in. And he didn't
14 have that problem, Your Honor.

15 And, therefore, both the plaintiff's causes
16 of action are without merit, and UNM is entitled to
17 summary judgment, as we will get into in great deal
18 later in this hearing.

19 Thank you, Your Honor.

20 THE COURT: Thank you, Mr. Marcus.

21 Mr. Norvell, do you want to give me an
22 overview of where you're going with this motion for
23 summary judgment?

24 MR. NORVELL: Yes, Your Honor.

25 MR. MARCUS: In response to the motion for

1 summary judgment, UNM would have the Court believe
2 that Dr. Rivero was broadly regarded as a problem
3 employee, a problem physician; that he was completely
4 unprofessional, and his job suffered because of it.
5 That's completely untrue. Evidence presented to the
6 Court shows that his relationships with colleagues
7 and his work was unparalleled as a physician, as an
8 orthopaedic surgeon. He was highly regarded as an
9 orthopaedic surgeon, one of the best in the
10 southwest.

11 His relationships with his nurses, with
12 staff, with patients, all of that has been shown with
13 evidence presented to the Court to be true; that he
14 was not, in fact, suffering from professionalism
15 issues.

16 Dr. Rivero has brought these claims against
17 UNM for an illegal medical inquiry, for constructive
18 discharge, and also for an unaddressed retaliation
19 claim based on the fact that the agreement referenced
20 by Mr. Marcus that was reached between his department
21 chair and himself, between Dr. Rivero and his
22 department chair in December of 2010, the agreement
23 did warrant four counseling sessions and was
24 structured for success.

25 Dr. Rivero received the addendum, which was

1 starkly different from that agreement. It required
2 psychiatric examinations, which the defendant itself
3 admits, in response to one of the motions in limine,
4 to indicate a severe mental impairment. These were
5 not counseling sessions. This was an overly broad
6 document that sought to invade Dr. Rivero's privacy.
7 It was not tailored toward any aspect of counseling
8 that the parties had agreed upon, which Dr. Rivero
9 agreed to as a condition in December 2010, of
10 returning. It was, frankly, just to improve patient
11 interactions.

12 When Dr. Rivero received the addendum, he
13 was shocked by it, and did not understand why it was
14 so broad and so invasive and without any limitation,
15 and why it was a requirement that he take -- that he
16 submit to psychiatric examinations; that he pay for
17 it; and that he waive all of his rights under the
18 addendum, all of his rights, including constitutional
19 rights.

20 So he undertook an endeavor to find out the
21 basis for this. He sought to review the documents
22 that were in his credentialing file, which he felt
23 made -- if there was anything there to substantiate
24 it, that would be a place to start.

25 He was stonewalled by UNM. They interfered

1 with his ability to access his own files. They went
2 silent. Dr. Schenck withdrew the addendum. And Dr.
3 Rivero had to file an action in state court to access
4 those files. That litigation, which was ultimately
5 deemed to have been wrongfully defended by UNM
6 ultimately resulted in the court issuing the order to
7 release those documents, and to certify that all
8 documents had been released.

9 When the certification was received from
10 physicians Dr. John Trotter and Dr. Bailey,
11 administrators at UNM, Dr. Rivero realized there was
12 nothing there to substantiate that oppressive
13 addendum, and therefore, he felt as though, you know,
14 there is no basis for it. That's when the claim
15 accrued under the statute of limitations for the
16 illegal medical inquiry, for the discrimination under
17 that particular statute.

18 He left UNM in January, never returned, and
19 he tendered his formal resignation, constructive
20 discharge in May of 2014. As argued in the response
21 for the motion for summary judgment, with respect to
22 the statute of limitations, Judge Lynch had ruled
23 during motion to dismiss stage that the statute of
24 limitations was adequately -- that the claims were
25 filed timely.

1 Nothing has changed. Through discovery no
2 facts have changed. There has been nothing
3 introduced to change that. There has been no change
4 in the law. There has been no change in factual
5 evidence presented. Nothing. And the Law of the
6 Case Doctrine would warrant that Judge Lynch's logic
7 proceed forward.

8 Additionally, under the Green case, Green
9 versus Brennan, it's very clear that the two-step
10 process of filing a discrimination claim, and then
11 returning to amend to include a constructive
12 discharge claim is not the process that the Supreme
13 Court adheres to under these types of claims under
14 the Rehabilitation Act, under a constructive
15 discharge claim.

16 With respect to the constructive discharge
17 claim itself, there is a question of fact as to
18 "regarded as." It is not as Mr. Marcus has said
19 deemed to be disabled; it is regarded as. And the
20 actions of UNM, taking the addendum on its face, in
21 its breadth and its overbreadth and its lack of
22 narrowness, which is required for a so-called fitness
23 for duty or any other examination that would be
24 proper, it's overly broad.

25 Defendant would have the Court believe that

1 that single instance is not enough to give rise to a
2 discriminatory action. However, in the cases that
3 they cited, there is no indication of the type of
4 examination submitted in any of their cases resembles
5 the breadth and invasiveness of this.

6 Additionally, Dr. Schenck in his statements
7 of deposition stated that stress was a consideration,
8 and that Dr. Rivero -- he was concerned that Dr.
9 Rivero's reaction to stress was a disabling condition
10 that would make it more difficult for him to succeed
11 in returning to UNM. Those give rise to a question
12 of fact as to the "regarded as disabled" aspect of
13 constructive discharge.

14 Let me check my notes, Your Honor, I
15 apologize.

16 Real quickly, with regard to the illegal
17 medical inquiry within the addendum, a review of the
18 addendum shows its broad oppressiveness, and shows
19 that, really, it's too general to be permissible
20 under the Rehabilitation Act and the Americans with
21 Disabilities Act, which is incorporated into the
22 Rehabilitation Act.

23 With respect to the unbearable working
24 conditions, the conditions under which Dr. Rivero had
25 suffered relate initially to a dispute from 2003 with

1 Dr. Pitcher, and proceeded forward throughout the
2 years, from the time that he reduced his time to go
3 into private practice to a .05, and then to return
4 to -- attempt to return to .75. These administrative
5 vendettas continued. Dr. Schenck, who claimed to be
6 his advocate, was misleading him and flip-flopped in
7 his position of being an advocate for Dr. Rivero's
8 return.

9 Additionally, the withholding and the
10 frivolous defenses submitted in litigation made it
11 very difficult for Dr. Rivero, especially given that
12 there was no basis for the addendum, made it very
13 difficult for Dr. Rivero, and unbearable for anyone
14 in a similar situation to possibly return.

15 That's my overview, Your Honor. And I'm
16 willing to submit to questions at your leisure.

17 THE COURT: All right. I'll have some in a
18 moment. Thank you, Mr. Norvell.

19 Mr. Marcus, anything else you want to say?
20 And then I'd like to go into the facts, unless you
21 have something else you want to say from an overview
22 or summary standpoint.

23 MR. MARCUS: Everything I was going to say,
24 Your Honor, we can discuss in the factual portion.

25 THE COURT: All right. Let's get into the

1 facts. I haven't mastered these facts because there
2 are a lot of them. But my sense is that, at least on
3 your statement of the facts, there were not a lot of
4 disputes about your statement of the facts. There
5 was a lot of contentions that some of them are
6 irrelevant, immaterial, those sort of things, but not
7 a lot of disputes. How would you characterize the
8 response on the factual record that you received to
9 your statement of the facts?

10 MR. MARCUS: I would characterize the
11 response as consisting largely of arguments of
12 counsel rather than actual substantive disputed
13 facts.

14 THE COURT: Let's go to the large number of
15 facts that the plaintiff then put into the record in
16 his response. I haven't really mastered your
17 response back.

18 Are you disputing a lot of what he's
19 putting into the record as facts or, again, are you
20 just characterizing many of them as irrelevant?
21 What's your posture with the large number of facts
22 that he put into the record?

23 MR. MARCUS: I'm disputing most of them as
24 irrelevant. He cited many statements made by people
25 who did like Dr. Rivero, saying that -- sort of

1 praising him. But at the same time, most of those
2 statements -- just because some people like somebody,
3 that doesn't mean that he wasn't running into lots
4 and lots of trouble with other people, and that this
5 trouble could have jeopardized his surgical career,
6 could have jeopardized his relationship with UNM and
7 UNM's legal status.

8 And, Your Honor, I think most of the
9 statements brought in from people who liked him, yes,
10 of course, they're friends. I think that it's
11 irrelevant to his overall professionalism.

12 THE COURT: You're saying they're
13 irrelevant, but you're not disputing them either? Is
14 that a fair characterization of most of these facts
15 that he's putting in?

16 MR. MARCUS: I'm not disputing that these
17 people said -- made these statement at their
18 depositions.

19 THE COURT: All right. Thank you,
20 Mr. Marcus.

21 Mr. Norvell, what do you see as -- do you
22 see factual issues really blocking the ability of the
23 Court to reach the legal issues, or do you see some
24 genuine issues of material fact that are going to
25 preclude the Court from getting to the legal issues

1 here?

2 MR. NORVELL: When you say the Court --
3 preclude the Court from getting to legal issues --

4 THE COURT: Yeah, I mean, are there some
5 factual issues here that are so important that
6 they're going to keep the Court from getting to the
7 legal issues that these motions raise?

8 MR. NORVELL: I think that the factual
9 issues that the -- the defendant cherry-picks
10 particular emails in order to portray Dr. Rivero as
11 having acted unprofessionally. I attempt to flesh
12 that out in my response by saying, look, that's not
13 the entire context of things.

14 Dr. Rivero was never disciplined. He was
15 never suspended. All of these so-called complaints
16 from people have a fuller story, none of which
17 resulted in a finding of fault, harm, or other blame
18 to Dr. Rivero. He was exonerated in every instance.

19 UNM is attempting to have their cake and
20 eat it too here with respect to, in particular,
21 complaints from a patient advocate named Willie
22 Barela for example. I'm sure the Court has reviewed
23 those. On the one hand, UNM is saying, Well, you're
24 just looking at Dr. Rivero's response to Willie
25 Barela as being problematic. Two issues there. One,

1 Willie Barela was a patient advocate, and similar to
2 the Fritch (phonetic) case that's cited by the
3 defendant, an advocate should be able to withstand
4 the conflict that arises in that position.

5 Secondly, while it says that it's only
6 looking at the responses to Willie Barela, it's
7 emphasizing that these complaints -- and attempting
8 to persuade the Court that these complaints, which
9 were not investigated and not substantiated, had
10 grounding and were the reason for these
11 professionalisms that gave rise to this notion of
12 this overly broad addendum that UNM attempted to
13 impose on him.

14 So the facts of professionalism, I think,
15 are very much in dispute. I don't think that it's
16 the type of clear-cut factual issue that could be
17 decided at the summary judgment stage, and should be
18 preserved for a jury.

19 With respect to the statute of limitations,
20 those are -- the Court would -- if it would please
21 the Court, our position is that has already been
22 decided, and nothing has changed with respect to the
23 legal analysis the facts presented, or any other
24 aspect of it. Green versus Brennan is the most
25 recent case. And that's the consideration for the

1 case.

2 With respect to constructive discharge, I
3 believe there are questions of fact as to whether UNM
4 regarded Dr. Rivero as disabled. And from our
5 position, the working environment was unbearable for
6 a person in Dr. Rivero's position, a man whose
7 reputation was unparalleled in the community as an
8 orthopaedic surgeon, and suddenly is being subjected
9 to slander. He's getting impeded from determining
10 whether there is any merit to the addendum. His
11 so-called advocate, Dr. Schenck, flip-flopped on him.
12 You know, those sorts of facts; the litigation
13 impediment, that which, from a legal standpoint could
14 be seen as an almost equitable estoppel position, in
15 that Dr. Rivero was precluded from really making a
16 determination of discrimination, until such time as
17 all of that played out. I think those are facts that
18 are also up in the air for a jury to determine.

19 Additionally, there is really no clarity as
20 to what professionalism means. UNM has made that a
21 moving target. And it would seem that a jury would
22 be in a position to determine the veracity and
23 credibility of their position as to professionalism.

24 Dr. Rivero has never -- his work -- his
25 essential job functions had never been at issue. He

1 continued to perform his job as an orthopaedic
2 surgeon, not only at UNM, but full-time in Oklahoma
3 as well, without any sort of complaint, without any
4 deterioration. UNM can present no evidence that they
5 ever did, in fact, find any deterioration of his
6 essential job duties. They can also not cite
7 necessarily that -- and it's a question of fact
8 whether the professionalism claim constitutes an
9 essential job function. I think that's a
10 determination to be made by a fact finder at trial.

11 Furthermore, the facts of the extent of the
12 overbreadth of the addendum is something that is
13 certainly preserved for trial, because there are
14 questions as to its reasonableness and its
15 overbreadth, when looked at in the context of the
16 legal requirement that it be more narrow to befit the
17 particulars of an approach to what, ostensibly,
18 defendant wanted to do, which was improve
19 professionalism. That's not the case. And we argue
20 that it's clearly not the case.

21 So we think that there are -- those are
22 essentially the issues of fact that -- when you say
23 preclude the Court, I'm presuming you mean yourself,
24 Your Honor, at the summary judgment stage. I think
25 that there are issues of fact that we have presented

1 that would preclude summary judgment at this stage,
2 and should be preserved for trial in front of the
3 jury.

4 THE COURT: Well, what do you think is the
5 biggest issue of fact? What is it that, when you
6 look at their facts, the defendant's facts, your
7 facts, all the facts that are being presented, what
8 do you think is an issue of fact that precludes the
9 Court from deciding the legal issues that are in this
10 motion? Can you think of one where y'all simply
11 don't agree that that occurred?

12 MR. NORVELL: Well, Mr. Marcus would
13 present any number of the complaints submitted by
14 Willie Barela. For example, there is a fact
15 presented by UNM with respect to Dr. Rivero and a
16 patient, an intravenous drug user, claiming that Dr.
17 Rivero compared him to a monkey. And there was an
18 interaction in which Dr. Rivero attempted to explain
19 the power of addictiveness, and explained in
20 deposition his hesitancy to perform surgery on
21 recovering addicts, due to the potential for
22 infection on prosthetic limbs. Is there a fact --
23 there are several of them frankly along those lines,
24 where they're just not fleshed out by defendant, and
25 the fuller story indicates that Dr. Rivero did

1 nothing wrong, did not act unprofessionally. He was
2 simply -- the complaint was made. Willie Barela made
3 it. UNM took it at face value. It was never
4 investigated. And Dr. Rivero's defense was never
5 followed. Therefore, how can there be a truly
6 sensible determination of an unprofessional action,
7 if all the complaints that were made were
8 unsubstantiated?

9 THE COURT: All right. Thank you, Mr.
10 Norvell.

11 Anything else you want to say on the facts,
12 Mr. Marcus?

13 MR. MARCUS: Thank you, Your Honor.

14 I'd like to discuss the statute of
15 limitation issue first.

16 THE COURT: All right.

17 MR. MARCUS: I'd like to do a quick
18 timeline, Your Honor.

19 THE COURT: Okay.

20 MR. MARCUS: Plaintiff received the
21 addendum -- I think it's best to consider this case
22 as two different causes of actions, the way Judge
23 Lynch did. First, for the medical inquiry itself,
24 and secondly, for the alleged constructive discharge.

25 Regarding the medical inquiry, I think the

1 statute of limitations argument is very simple and
2 pretty clear. Plaintiff received the addendum in
3 March of 2011. And around that time -- and he
4 testified at his deposition that at about that time
5 he believed very strongly that his rights were
6 violated. At that point for the allegedly illegal
7 medical inquiry, he had a complete and present cause
8 of action as described in the Green versus Brennan
9 case where Justice Sotomayor said when a plaintiff
10 can file suit and receive relief. He had everything
11 he needed to do to file the complaint regarding the
12 allegedly illegal medical inquiry. However, he did
13 not file the complaint for the allegedly illegal
14 medical inquiry until 2016, I think April or May of
15 2016, more than five years after he received the
16 addendum. And the case law is clear, Baker versus
17 Board of Regents of the State of Kansas, and any
18 number of other cases, the cause of action accrues
19 when the action takes place. And apparently,
20 plaintiff believed that he had a cause of action, he
21 believed his rights -- he believed very strongly, he
22 said at deposition, that his rights were violated.

23 So, Your Honor, I think he filed a
24 Rehabilitation Act claim five years after he received
25 the addendum. That is -- that's a clear time bar,

1 Your Honor. Absolutely no question about that.

2 And regarding the constructive discharge, I
3 think --

4 THE COURT: Well, let's take that first
5 issue. What did Judge Lynch do with -- it tested me
6 to get through all the filings for today's motions,
7 so I didn't get to go back and look at his opinion.
8 What did he do with that issue? And why did he not
9 dismiss it earlier in the case on that ground?

10 MR. MARCUS: Well, of course, it was based
11 simply on the allegations of the complaint. And what
12 he said was that the cause of action for the
13 allegedly medical inquiry did not accrue until
14 January of 2014, which would make it not time-barred.
15 And the reason for that decision was it wasn't until
16 January 14 that plaintiff received his entire file,
17 and received an affidavit stating that he had his
18 entire file. But that's not necessary.

19 First of all, as you know, you can -- this
20 Court can revisit an old decision of a district court
21 at any time. It was not a final decision, it was not
22 an appellate decision. The Court has the ability to
23 do that.

24 And the law of the case -- the plaintiff
25 has misinterpreted the Law of the Case Doctrine,

1 which generally only applied to appellate decisions.
2 Let's say this case were appealed and the Tenth
3 Circuit said something, the district court could then
4 go against what the Tenth Circuit said. And that's
5 the issue. It was a nonfinal order, an interlocutory
6 order, which the district court can revisit at any
7 time. And we have some new evidence -- we have
8 plaintiff's deposition in which he said prior to --
9 more than three years prior to bringing up this
10 litigation, he believed very strongly -- in his
11 deposition he stated that, that his rights were
12 violated. And --

13 THE COURT: What was it about getting all
14 his medical records that caused Judge Lynch to think
15 that was the date that his cause of action accrued?

16 MR. MARCUS: He seemed to -- Your Honor, it
17 was actually his employment file. And he seemed to
18 think that he didn't have a complete and present
19 cause of action until that time.

20 And frankly, with all due respect, and I
21 sincerely apologize for making this statement about
22 another member of the bench, but I think that Judge
23 Lynch made a mistake, he made an error in that
24 regard. And Your Honor, with all due respect to him,
25 I think that error should be reversed.

1 THE COURT: All right. Anything else on
2 that cause of action and the statute of limitations?

3 MR. MARCUS: On the statute of limitations,
4 no.

5 THE COURT: All right. Let me hear from
6 Mr. Norvell on that aspect, then. Mr. Norvell.

7 MR. NORVELL: Yes, Your Honor.

8 Mr. Marcus is accurate in that Judge Lynch
9 ruled --

10 THE COURT: You know, I'll say this: One
11 thing is to talk about a motion to dismiss, the
12 statute of limitations, is the plaintiff is usually
13 in control of the pleading. And oftentimes, it's
14 difficult for a defendant to get a complaint
15 dismissed on statute of limitations, because if you
16 don't put any dates in there, you don't want to make
17 it easy for them. I've held that you don't have to
18 make it easy for them. So it's tough in this
19 circuit, and particularly with me, to get statute of
20 limitations issues decided at the motion to dismiss
21 stage, unless the plaintiff wants to tee it up and
22 find out early on whether they've got a time problem.

23 MR. NORVELL: Dates were certainly part of
24 the motion to dismiss. Judge Lynch -- contrary to
25 what Mr. Marcus says, Judge Lynch had in his order

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1 denying the motion to dismiss considered all of the
2 aspects that Mr. Marcus just stated.

3 The EEOC complaint was not some new piece
4 of evidence that came out in discovery. All that Dr.
5 Rivero did was confirm that that was filed. Judge
6 Lynch considered the filing of the EEOC complaint in
7 2012. He considered the timeline that discovery
8 simply confirmed. There have been no new facts that
9 would change the arguments with respect to the
10 statute of limitations.

11 In fact, the law, as of May of 2016, under
12 Green versus Brennan, very clear supports the
13 position that Judge Lynch found that they were timely
14 filed.

15 January 2014, when UNM signed the
16 affidavits certifying that complete production had
17 occurred, and Dr. Rivero was unable to determine that
18 there was any basis for addendum, Judge Lynch said,
19 Well, that's when it accrued.

20 Nothing has changed. Those facts remain
21 consistent and supported by evidence of record now.
22 May 2014, Dr. Rivero resigned; that's the
23 constructive discharge, that fact has never changed.
24 The timeline is simply straightforward, supported by
25 all of the facts that were present and assumed to be

1 true at the motion to dismiss stage. They're
2 confirmed by record evidence now. Dr. Rivero did not
3 have a complete picture of the reason for the
4 addendum. Judge Lynch acknowledged that. Nothing
5 has changed. There have been no changes at all.

6 And so the motion to dismiss, I think,
7 withstands any attempt for revisitation by
8 defendants. All the law cited by the defendant
9 predates Green.

10 Additionally, Dr. Rivero may have believed
11 there was a cause of action, but he did not know.
12 And Judge Lynch took that into consideration in his
13 determination during the motion to dismiss stage.

14 THE COURT: Well, I guess I'm struggling a
15 little bit to figure out why him getting his
16 employment file, getting all the records in the
17 employment file would be the triggering date for a
18 cause of action for the medical inquiry claim. It
19 seems to me that unless you're trying to get some
20 tolling doctrine, the production of the employment
21 file is not going to be a particularly important
22 date. What would be important is -- what you're
23 saying is the wrong, and when the harm occurred. And
24 that would be much earlier, at the time the addendum
25 was presented.

1 MR. NORVELL: It's not simply an employment
2 file. It's a credentialing file that would contain
3 all of the -- any supporting document that would give
4 a basis for the presentation of the addendum, and the
5 imposition of a broad psychiatric examination.

6 When Dr. Rivero challenged UNM on the basis
7 for it, to seek documents that would support their
8 position that he needed to submit to this invasive
9 psychiatric, four-part battery of psychiatric
10 examinations, they refused him access. They blocked
11 him. Litigation had to be commenced. UNM posited
12 frivolous defenses. They were sanctioned with
13 attorneys' fees by the state court. To the extent
14 that we're looking at an equitable estoppel argument,
15 I think that we have some aspect of that, in that UNM
16 attempted to preclude Dr. Rivero from finding out and
17 from seeking what he was entitled to as an employee
18 at UNM.

19 That information would have been -- if
20 Dr. Rivero had found some basis for the psychiatric
21 examination, that would have changed the whole
22 picture. But there was none. UNM certified that all
23 documents had been produced. There was no basis for
24 it. And the value of those documents was a
25 confirming factual basis -- not only a legal basis, a

1 confirming factual basis -- that there was no
2 underlying rationale behind presenting the
3 psychiatric examination.

4 THE COURT: All right. Thank you, Mr.
5 Norvell.

6 Anything else you want to say on that --
7 statute of limitations, on that claim, Mr. Marcus?

8 MR. MARCUS: Yes, Your Honor.

9 First of all, Mr. Norvell never raised a
10 tolling argument in his briefing. He never raised
11 any sort of equitable tolling argument in his
12 briefing.

13 Secondly, there is no equitable tolling
14 argument because plaintiff had every -- had all that
15 he needed to know to file a cause of action. As
16 plaintiff's counsel pointed out, he filed an EEOC
17 complaint. Now, this EEOC complaint was for the
18 Americans With Disabilities Act, which doesn't apply
19 to UNM as a state entity. But it didn't toll the
20 proceedings, because an administrative procedure is
21 not a prerequisite for a claim under the
22 Rehabilitation Act. So, therefore, it doesn't toll
23 the claim under the statute of limitations of the
24 Rehabilitation Act. That's a straight three years,
25 Your Honor.

1 Secondly, as stated before, plaintiff did
2 strongly believe that his rights were violated. He
3 could have filed a suit back in 2011, or early 2012.
4 He could have filed it then. And then he could have
5 engaged in discovery to get his file. The mandamus
6 action that plaintiff's counsel describes, that I
7 think is somewhat irrelevant to these proceedings,
8 and I think it's covered by a current pending action,
9 which I -- it's a little tricky to deal with, but I
10 believe that the reason why UNM didn't provide his
11 file at the time, they were concerned about ROIA.
12 But if he had filed a lawsuit, he could have --

13 THE COURT: They were worried about what?

14 MR. MARCUS: The Review Organizations
15 Immunity Act, which makes it -- provides penalties
16 for providing a peer review file at a medical
17 institution to the wrong people. And plaintiff and
18 his lawyers, they were concerned -- they were
19 concerned that they were going to be violating this
20 act.

21 And if plaintiff had filed a lawsuit, on
22 the other hand, he could have obtained all these
23 documents in discovery. He could have filed a
24 lawsuit upon information and belief they had no
25 reason to do this, upon information. And plaintiffs

1 do that all the time. As we point out, you don't
2 have to make it easy, you don't have to add all of
3 the details in there.

4 So there was no equitable tolling, because
5 you don't have an equitable tolling argument if the
6 defendant does take some affirmative steps to prevent
7 the plaintiff from finding out that they did
8 something that the plaintiff believed to be illegal.
9 And plaintiff knew that he had -- he believed it to
10 be illegal. We don't believe it to be illegal, but
11 he had a medical inquiry in March of 2011, Your
12 Honor. And at the time he believed that his rights
13 were violated. That's all he needed, Your Honor, to
14 bring the instant litigation.

15 Nothing that UNM did prevented him from
16 bringing the litigation within the three year statute
17 of limitation. And, therefore, there is no tolling.
18 The cause of action accrued in 2011. The claim for
19 the allegedly illegal medical inquiry is clearly
20 time-barred.

21 THE COURT: All right. Do you want to go
22 to the statute of limitations on the constructive
23 discharge claim?

24 MR. MARCUS: Your Honor, we don't have a
25 statute of limitations argument on the constructive

1 discharge claim.

2 THE COURT: All right.

3 MR. MARCUS: Plaintiff is trying to confuse
4 the two issues, because they bring in Green versus
5 Brennan; it concerns a constructive discharge only.
6 And in that case we do understand that that is the
7 law, so we don't have a statute of limitation
8 argument on the constructive discharge.

9 Thank you, Your Honor.

10 THE COURT: All right. Let's go ahead
11 then, and do you want to start tackling the merits of
12 the medical examination claim?

13 MR. MARCUS: Yes, Your Honor. Should I
14 come to the lectern?

15 THE COURT: Oh, you bet. Wherever you want
16 to be.

17 MR. MARCUS: Thank you, Your Honor.

18 Your Honor, as you're aware, an employer is
19 allowed to require an employee to submit to a medical
20 inquiry, if the medical inquiry is job related and
21 consistent with business necessity. In this case,
22 the medical inquiry was clearly job related and
23 consistent with business necessity.

24 Plaintiff is, admittedly, a very
25 technically proficient surgeon: Great hands, great

1 technical know-how. But he fell short in the area of
2 professionalism. And this professionalism problem
3 was creating substantial issues with his patients and
4 with nurses and with other members of the medical
5 staff.

6 There is substantial case law, Your Honor,
7 particularly Lanman versus Johnson County Kansas,
8 Tenth Circuit, in which case a person who is acting
9 in a fairly unprofessional manner -- in this case, it
10 was a former deputy sheriff, and the person was
11 acting in sort of an unusual manner, and was creating
12 some issues with her coworkers. And no one ever
13 assumed that she had a serious psychological problem
14 of any sort, but they required her to have a
15 psychological/psychiatric fitness for duty
16 evaluation.

17 THE COURT: Well -- and I don't know the
18 law well enough in this area, so you both will have
19 to educate me. But when you -- let's take the
20 police, because it's one that seems to be apt. If
21 you require all the police to undergo some
22 psychological examination on a periodic basis or
23 screening at the beginning or something like that,
24 that is certainly job related and consistent with the
25 department's necessity of having sound police

1 officers. But can they just pick out one police
2 officer and say: We want you to have it without
3 deeming that person to have a psychological problem?
4 Once they single out a single person and impose that
5 requirement, aren't they implicitly saying that
6 person has a psychological problem that has to be
7 addressed? I mean, isn't it one thing to do it
8 across the board, and is it another to single out an
9 employee and impose a particular requirement on them?

10 MR. MARCUS: According to Lanman, the
11 Lanman case, singling out a person for a psychiatric
12 evaluation does not necessarily mean that the
13 employer deems the person or regards the person as
14 disabled. It says here, "personality conflicts among
15 coworkers, even those expressed through the use or
16 misuse of mental health terminology, generally do not
17 establish a perceived impairment on the part of the
18 employer."

19 Now, plaintiff might argue that several
20 coworkers were joking around that this particular
21 employee was nuts or crazy, but they also require a
22 fitness for duty exam. And it says, look --

23 THE COURT: Of just that single employee.

24 MR. MARCUS: Just that single employee.

25 And the Tenth Circuit noted, "Employers need to be

1 able to use reasonable means to ascertain the cause
2 of troubling behavior without exposing themselves to
3 ADA claims. This is especially true in professions
4 like law enforcement, where employees are responsible
5 for the care and safety of others." In medicine
6 employees are also responsible for the care and
7 safety of others. So they can single out a
8 particular person if the person's behavior is
9 troubling and they're trying to correct a
10 professionalism issue, rather than -- and it doesn't
11 necessarily mean that the person has a psychiatric
12 disorder.

13 THE COURT: All right. Anything else you
14 want to say on the imposition of the condition?

15 MR. MARCUS: Well, I think that there is
16 substantial evidence that there was substantial
17 examples of unprofessionalism issues that plaintiff
18 exhibited. There were approximately 10 patient
19 complaints alleging that Dr. River made disparaging
20 comments about a patient's inability to speak
21 English, and -- or his focus on money and payments,
22 patients, concerns he would not be paid, and anger
23 management issues. Maybe they didn't have proof,
24 enough proof for each one of them. But in the
25 aggregate, that's a troubling picture, Your Honor.

1 There was a complaint made to the Office of Civil
2 Rights alleging discrimination against the patient
3 who didn't speak English.

4 And then you have the emails that plaintiff
5 sent out to Willie Barela. These emails clearly show
6 someone who is not behaving properly, essentially.
7 He was using all caps. Essentially, it was a blame
8 the messenger type of email, where he tells the guy:
9 You're wrong, wrong, wrong, in all caps, merely for
10 forwarding a patient complaint to him, Your Honor.
11 That's all he did. And in his email he told them,
12 "I'm going to not show up at the general ortho clinic
13 anymore." There is probably another email he sent to
14 Mr. Barela. There were several scathing emails. But
15 in one he said, "I'm not going to show up at the
16 general ortho clinic anymore. And I'm not going to
17 speak Spanish to people anymore, despite the fact I'm
18 fluent in Spanish, because these patients are the
19 ones that cause me the most trouble." And that's in
20 an email that's not disputed.

21 And, yes, a patient did come away from
22 interaction with Dr. Rivero thinking that he was
23 being compared to a monkey. Whether that was Dr.
24 Rivero's intention or not that's -- if a patient
25 comes away from interaction with you thinking that

1 the doctor just compared him to a monkey, then the
2 doctor really needs to work on his skills with
3 interacting with his patients.

4 And with all due respect, I mean, Dr.
5 Rivero did -- he was well known for being a very
6 skilled surgeon. No one disputes that. But what was
7 UNM to do? You have someone who is a skilled
8 surgeon, he's great at doing what he does, this high
9 level of orthopaedic surgery, and -- but the
10 professionalism is a big problem.

11 And in more recent years, medical
12 accreditation organizations have added a renewed
13 focus on professionalism. There is no more like,
14 "Surgeons will be surgeons." You have to learn how
15 to interact better with people. And there has been
16 sentinel med alerts: What do you do? And Dr.
17 Schenck, the chairman of the orthopaedic department,
18 sat down with him, and they suggested counseling
19 sessions. And then this resulted in an addendum
20 later on, not written by Dr. Schenck, but written by
21 other members, by probably other people at UNM. But
22 this -- try to have some sort of a psychological
23 evaluation to determine the cause of Dr. Rivero's
24 troubling behavior, just as has been allowed by
25 Lanman versus Johnson County Kansas.

1 So this medical inquiry was clearly job
2 related, consistent with business necessity,
3 consistent with UNM's continued accreditation,
4 frankly. They couldn't bring him back if he
5 continued to act in this manner.

6 And they wanted to bring him back, but they
7 couldn't. So this was a way of dealing with it. UNM
8 attempted to compromise, to set up some way of
9 dealing with the situation. Its reward? Three
10 lawsuits.

11 Thank you, Your Honor.

12 THE COURT: Thank you, Mr. Marcus.

13 Mr. Norvell, do you want to address the
14 psychological requirement?

15 MR. NORVELL: Yes, Your Honor.

16 And I'd like to emphasize, as it relates to
17 one of the motions in limine, again -- and I've said
18 this previously at this hearing -- the requirement
19 was a psychiatric examination, and all the
20 implications that come with the admittedly severe
21 implications of a mental disorder.

22 With respect to Mr. Marcus' statements that
23 there were quote/unquote issues with patients and
24 issues with staff that were severe enough to warrant
25 the imposition of a battery of psychiatric

1 examinations, that's just not supported by the
2 evidence. As I said previously, when you flesh out
3 the complaints that are presented to the Court as a
4 basis for this, they were all unsubstantiated.

5 The reference to the Office of Civil Rights
6 complaint, that had to do with the failure --
7 ultimately it was decided that the failure of UNM to
8 provide translators was the fundamental cause there.
9 Dr. Rivero was not found to be at fault in any way.
10 He did not jeopardize UNM in any way. A complaint to
11 the Joint Commission which governs credentialing Dr.
12 Rivero was exonerated by his own department chair for
13 the alleged complaint.

14 The interactions with Willie Barela, Willie
15 Barela was a patient advocate. There are no
16 physician advocates to defend people like Dr. Rivero
17 at UNM. He had to defend his reputation and his
18 position.

19 Moreover, in order to impose a psychiatric
20 examination for what UNM would characterize as a
21 fitness for duty exam, there has to be a
22 particularized approach, we call it possibly narrowly
23 tailored approach, and a showing that Dr. Rivero was
24 unable to perform his essential job functions. There
25 has been no showing of that whatsoever. There has

1 been no evidence presented that accreditation by
2 JCAHO was jeopardized. There has been no showing
3 that Dr. Rivero did anything but continue to perform
4 at the highest level as an orthopaedic surgeon during
5 the entire period in question.

6 With respect to the interaction that again
7 was brought up with respect to the intravenous drug
8 user, we have presented evidence that a fellow -- a
9 resident on duty signed a letter that said there was
10 no unprofessionalism on Dr. Rivero's part. So UNM is
11 creating, essentially, an excuse for what was an
12 improper act. And they know that it was improper, so
13 they have to reconstitute a rationale based on these
14 unsubstantiated complaints.

15 I think I've retreaded a lot of what we've
16 already talked about. And at the core of it -- I
17 don't know if the Court has had the opportunity to
18 review the addendum itself, which is central to this
19 dispute. But it is very oppressive. It is not
20 designed to address the so-called issues of
21 professionalism that UNM is here stating that it is
22 meant to. It requires waiver of all of his rights.
23 It forces him to submit to these onerous
24 requirements.

25 Additionally, in comparing any of the cases

1 that the defendant cites as a basis, looking at the
2 details of those cases is important. Dr. Rivero has
3 never threatened anyone. Dr. Rivero has defended
4 himself from false accusations. Dr. Rivero has not
5 presented any sort of potential violent threat or
6 threat to loss of business.

7 In fact, when asked at deposition, each
8 witness on behalf of UNM: Did Dr. Rivero present any
9 sort of threat to safety, to you, to others, to
10 anyone? No, there was never a concern of that. He
11 continued to operate, without complaint, both at UNM
12 and in Oklahoma, from 2006 on, until his resignation
13 in 2014. There simply isn't a basis for the notion
14 that professionalism issues gave rise to this.

15 He is singled out. This fitness for
16 duty -- it's not even a fitness for duty; it's simply
17 an oppressive tool. And it's illegal under the
18 Rehabilitation Act and the Americans With
19 Disabilities Act.

20 Furthermore, to clarify something that
21 Mr. Marcus referred to: There has never been
22 clarification on who drafted this addendum. They
23 admit that it was drafted by UNM, but Dr. Schenck
24 presented it; he was responsible for it. He was the
25 agent of UNM who was able to make the decision as to

1 the return of Dr. Rivero. I believe it was drafted
2 by UNM's legal department creating an insularity that
3 would be difficult to pierce in a litigation context.

4 And I would ask, as a final note, that the
5 Court consider, when looking at this illegal medical
6 inquiry, where is the line drawn with respect to
7 these types of examinations? It seems to me that UNM
8 would have the Court allow any sort of mental
9 examination, no matter how invasive or onerous, to
10 force employees to submit to whatever employment
11 practices they have. That's simply not the way the
12 law is designed. That's not good policy. And I
13 would ask that the Court consider that, given all of
14 those facts, this illegal medical inquiry was
15 wrongfully presented and creates and presents
16 liability for UNM, is preserved for trial by jury.

17 THE COURT: Well, let me explore with you
18 what I was exploring with Mr. Marcus. Let's use the
19 police context. Would you agree that APD, for
20 example, could take an officer and say: We've got
21 this many citizen complaints out here. We want you
22 to submit to psychological examination three or four
23 times a year. We don't want to have any excessive
24 force cases or lawsuits resulting from your actions.
25 Could they do that without in any way deeming the

1 person or regarding that person as disabled or having
2 psychological problems? They simply say: We're
3 doing this as a precautionary measure with a single
4 officer?

5 MR. NORVELL: It would depend on the
6 veracity of those complaints. You know, doctors,
7 like police officers, interact with how many people
8 on a yearly basis, right? I mean, Dr. Rivero in the
9 record it's shown that, with his nurse Arisele
10 Martinez, interacted with thousands and thousands of
11 patients over the years. Similarly, police officers
12 will interact with the public in dozens of
13 interactions per day.

14 It would behoove, and be incumbent upon APD
15 to investigate the veracity of those complaints
16 before presuming that someone is necessarily ripe for
17 some fitness for duty exam, much less some
18 psychiatric examination. Given the sort of general
19 societal climate of contentiousness between police
20 officers and the public, I think that there would be
21 an even more heightened level of concern and caution
22 before cherry-picking a single officer.

23 In Dr. Rivero's case, there was never an
24 allegation of deterioration of care. UNM itself has
25 said that Dr. Rivero was a superiorly proficient

1 physician. There has been no substandard care that
2 had been alleged. And, therefore, there have been no
3 complaints that have been substantiated. Therefore,
4 there is really no basis to present this type of
5 psychiatric examination.

6 THE COURT: Well, if I hear what you're
7 saying, you're agreeing that APD can do that. You're
8 just saying that they have to exercise some care in
9 how they do it. But there is nothing wrong, per se,
10 with picking out one police officer and somehow
11 getting to the point of requiring that one police
12 officer to be examined -- psychological examination
13 three or four times a year. There is nothing per se
14 that keeps them from singling one person out. They
15 can leave the rest of the officers out of that
16 requirement, that they do it right, single one out.

17 MR. NORVELL: I'm hesitant to agree with
18 the term "single one out." I mean, there would have
19 to be a real legal basis, a fundamental basis for it
20 that --

21 THE COURT: So what, then, is the test?
22 What is the test then for imposing it on one officer
23 and not the other?

24 MR. NORVELL: The test would be -- in a
25 general sense, Your Honor, I believe it would be a

1 threat to the public, as police officers are servants
2 of the public and interact with the public, and wield
3 some level of real authority and power. If those
4 actions, upon substantiation, created an
5 unjustifiable threat -- because there is going to be
6 force used by police officers -- if it created an
7 unjustifiable use of force or a direct threat of
8 safety -- and that's in the law, a direct threat of
9 safety -- is what is required to be shown.

10 If there is no showing that the essential
11 job functions are not being met, then you go to
12 whether there is a direct threat to safety of
13 those -- to whom the police officer is being served.
14 And I think you show either he's deteriorating in his
15 ability to serve as an officer or he presents a
16 direct threat. I think that's written in the law.
17 And it applies across professions. That's there.
18 But without that substantiation, without that
19 showing, it doesn't get the employer anywhere to
20 simply willy-nilly submit somebody to a four-part
21 battery of psychiatric examinations.

22 THE COURT: Well, what is the standard here
23 for a doctor? What is the standard by which we judge
24 whether a condition that's being imposed is job
25 related and consistent with the job?

1 MR. NORVELL: The standard is whether Dr.
2 Rivero has shown indications of the inability to
3 perform essential job functions or presents a direct
4 threat. The job relatedness is also tenuous because
5 there has been no suffering of job performance.
6 There have been no complaints after 2006. Remember,
7 this goes on for years, and he operates without any
8 sort of complaints. Yet, when it comes around that
9 there is an opportunity to increase his full-time
10 employment, UNM points back in time at
11 unsubstantiated complaints. Here, it's whether he is
12 unable to perform his essential job functions or
13 creates a direct threat. There is no evidence that
14 shows that either of those have been compromised in
15 any way by Dr. Rivero.

16 THE COURT: All right. Anything else you
17 want to say on this job condition, this psychological
18 examination condition, Mr. Norvell?

19 MR. NORVELL: Again, I would emphasize that
20 the Court consider strongly where the line is drawn
21 with respect to these psychiatric examinations. An
22 examination of the cases cited by defendant show real
23 physical threats: The drawing of a gun, the
24 insinuation that someone had a gun -- not the drawing
25 of a gun -- the insinuation of physical threats, the

1 insinuation of acting aggressively in front of
2 children; you know, those who are unable to perform
3 job duties.

4 That is simply not the case here. Dr.
5 Rivero has performed without parallel for many years,
6 without complaint, from that time that he asked to
7 return, all the way until he left.

8 So that's all I have, Your Honor.

9 THE COURT: All right. Thank you, Mr.
10 Norvell.

11 Mr. Marcus, I'll give you the final word on
12 this psychological examination requirement.

13 MR. MARCUS: Your Honor, I think it's
14 pretty clear that plaintiff's professionalism was an
15 impediment to his performing part of his job duties,
16 essentially. For instance, he was refusing to see
17 patients in the general ortho clinic. And then he
18 said that he wasn't going to speak Spanish to them.

19 Now, if UNM is accused of failure to
20 provide translators for people, when you have a
21 doctor who is known to be fluent in Spanish, and is
22 refusing to speak Spanish, that's not really good for
23 UNM's standing with the Office of Civil Rights.

24 And secondly, the Joint Commission has made
25 it clear, the Joint Commission which provides

1 accreditation for medical institutions, has made it
2 clear that they are focusing on professionalism; that
3 perhaps in the old days, physicians could do --
4 surgeons could do more what they wanted to. They
5 could be unprofessional, they could be gruff, they
6 could be difficult to deal with. But now they're
7 putting their foot down. This is the body that
8 provides UNM Hospital with its accreditation, Your
9 Honor. And they're saying that we need to do
10 something when people like Dr. Rivero act in certain
11 ways.

12 And his actions were clearly -- I mean, in
13 many ways they overstepped the bounds. Yes, there is
14 a patient advocate and there is no physician
15 advocate. But there is a right way and a wrong way
16 for a physician to respond to complaints.

17 Dr. Rivero -- he threatened Mr. Barela's
18 livelihood. He threatened to report him to his
19 supervisor. He wrote in all caps in an email, which
20 as you know, is the electronic equivalent of
21 screaming at somebody. And he overreacted. He gets
22 one complaint from the general ortho clinic, and
23 says, "I'm not going to talk to the patients in the
24 general ortho clinic anymore." That's an
25 overreaction and that's an issue that needs to be

1 dealt with.

2 So I think that he has failed consistently.
3 One portion of his -- maybe he was stellar in all the
4 other areas. He knows exactly how to operate on
5 somebody. He's great with his hands, an excellent,
6 excellent surgeon. But being able to interact with
7 your patients before and after and be able to
8 interact with staff, that's also important. And if
9 you can't do that, I think that does create a danger,
10 because these are people coming to the hospital with
11 medical issues, serious medical issues that they're
12 trying to get resolved. And when they're treated
13 poorly by the physician, by the surgeon prior to the
14 surgery, that's -- I mean, that can have an effect on
15 the person's recovery even.

16 And yes, the -- and by the way, the -- and
17 these emails that were sent to Barela, these are
18 completely undisputed. Plaintiff admits, for
19 instance, that the IV drug user who -- by the way,
20 had been clean for a year prior to this; that he --
21 that this former IV drug user did come away from the
22 interaction thinking he'd been compared to a monkey.
23 This was the email from Mr. Barela. And instead of
24 trying to deal with it, instead of trying to explain:
25 This is not what I meant, et cetera, he blames the

1 messenger.

2 So there are some -- this case is clearly
3 indistinguishable from many of the other cases that
4 I've cited. For instance, in the Lanman case all
5 that happened was that a sheriff's deputy had been
6 transferred, and that she sort of behaved in -- I'll
7 a call it a weird manner. She kissed someone on the
8 cheek inappropriately; said I'm going to miss working
9 with you, and she basically made some people she
10 worked with uncomfortable. She never threatened
11 anybody. She never pulled a gun. She never
12 insinuated she had a gun. Yet they required her to
13 take a fitness for duty exam.

14 Similarly, and Owusu -- I'm sorry about
15 butchering the name -- an Eleventh Circuit case --
16 Owusu-Ansah versus the Coca-Cola Company -- you had a
17 guy who, one time, banged his hand on a table and
18 said someone was going to pay, but he didn't specify
19 in any concern about a violent manner, and he had to
20 do a multipart -- the case law clearly implied there
21 was a multipart test, because he had to do Minnesota
22 Multiphasic Personality Inventory, which is only one
23 part of fitness for duty examine, as the case says.
24 And he -- this was someone who worked at a call
25 center at a soda company.

1 How much worse is it when you have a
2 surgeon responsible for people's lives showing this
3 type of difficulty with his interactions? How much
4 worse? This case is not only -- it's actually worse
5 than Owusu-Ansah and Lanman. There was actually more
6 justification for fitness for duty evaluation. It
7 was a pattern of difficulty. It went back his entire
8 career, but mostly -- it was getting worse in 2006,
9 but plaintiff -- for instance, at one point plaintiff
10 refused to get tested for MRSA. And this is someone
11 who supposedly is concerned about hospital-acquired
12 infections, yet he, himself, refused to be tested for
13 an infection.

14 So he has a whole history of making things
15 difficult, of having problems with his professional
16 interactions.

17 And finally, yes, it's true UNM had no
18 complaints about him after 2006. But think about it,
19 he's only been going to UNM to work one day a month.
20 So for all practical purposes, you have to -- maybe
21 he was there seven years after that. You have to
22 divide that number by 30 to get the effective length
23 of time. And that's just a couple of months. And so
24 there was no -- that's not surprising. Plus, when
25 you're there one day a month, you're not really

1 interacting much with conscious patients. You're
2 performing surgery, you're assisting other surgeons
3 with the surgeries, or you're working on patients
4 with whom you have a preexisting relationship.
5 You're not taking the lead on surgeries on total
6 strangers. So there is the big difference -- the
7 fact that he didn't have any complaints after 2007 is
8 irrelevant.

9 Finally, just one final point, if plaintiff
10 believed that he was acting professionally, why did
11 he agree to the four counseling sessions in the first
12 place? And why did he contact a psychiatrist and set
13 up these counseling sessions?

14 Thank you, Your Honor.

15 THE COURT: All right. Do you want to go
16 to constructive discharge?

17 MR. MARCUS: Yes, Your Honor.

18 Your Honor, plaintiff's claim for
19 constructive discharge is completely without merit,
20 and UNM is entitled to summary judgment as to that
21 claim. As you know, in order to establish a claim
22 for constructive discharge several prongs must be
23 met, and each one of them has to be met. The absence
24 of one of them is absolutely fatal to the claim.

25 The first prong is that there has to be

1 either a disability or a perception of disability.
2 And there is no evidence that UNM -- well, the
3 plaintiff denies he has a disability, and there is no
4 evidence that UNM perceived him or regarded him as
5 having a disability. Every year plaintiff's
6 privileges were renewed, with a statement saying that
7 he does not have a disability.

8 And as we discussed earlier, a requirement
9 to take a fitness for duty evaluation does not imply
10 a disability. It's not -- it doesn't mean that he's
11 regarded to have a disability. And plaintiff makes
12 no -- provides no other evidence. You need to have
13 something corroborating that to indicate that UNM
14 perceived him to have a disability.

15 And plaintiff brought up a couple of
16 issues, but none of them support his claim. First,
17 he claimed that one compromise that Dr. Schenck
18 agreed to was that he would not have to take call.
19 But that does not mean that Dr. Schenck thought he
20 had a disability. It just meant that he had trouble
21 with one aspect of one job. And that's not enough
22 for someone to be substantially impaired in the
23 essential life activity of working. And the creation
24 of an accommodation isn't necessarily an indication
25 that you regard the person as being disabled. As

1 Judge Easterbrook put it, "Decent managers try to
2 help employees cope with declining health without
3 knowing or caring whether they fit the definition of
4 some federal statute. Managers may also respond to
5 state laws, local regulations, collective bargaining
6 agreements, and other norms that go beyond federal
7 law," Your Honor.

8 So the fact that Dr. Schenck was allowing
9 plaintiff to avoid taking call, that's not an
10 indication that they he thought he had disabilities.
11 He was just trying to help him out. And they were
12 friends, they were friends before this, and he was
13 just trying to help him out, trying to find a way
14 that he could perform surgery in a manner that he had
15 been performing, but full-time, allowed to come back
16 full-time, and not have to -- and maybe avoid some of
17 these professionalism issues.

18 Dr. Schenck was trying to do him a favor.
19 And this is how he's rewarded, Your Honor.
20 Dr. Schenck was being a decent manager, as Judge
21 Easterbrook put it. By the way, this was the Cigan
22 versus Chippewa Falls School District, Seventh
23 Circuit. So that's all Dr. Schenck was doing. He
24 was being a decent manager.

25 And there is no other evidence that UNM

1 considered the plaintiff to have a disability. As a
2 matter of fact, as you heard from plaintiff's counsel
3 earlier today, plaintiff claims that he had a
4 personality conflict with another doctor at the
5 hospital, Dr. Pitcher. And that this personality
6 conflict was the cause of his tension. Well, Your
7 Honor, which is it? It is a perception of disability
8 or a personality conflict? Because if it's a
9 personality conflict, well, there is no -- it's
10 clear, a mere personality conflict does not indicate
11 constructive discharge, Turnwall versus Trust Company
12 of America. There is no -- there is no evidence that
13 Dr. Pitcher had this -- even if he did have this
14 personality conflict, that he had this personality
15 conflict because he thought that Dr. Rivero was
16 disabled. There is absolutely no evidence. And as
17 you know, under Celotex, you need to have -- it's the
18 plaintiff's duty to produce sufficient evidence to
19 survive summary judgment. And plaintiff hasn't done
20 that.

21 Secondly, there must be action complained
22 of; must have been motivated by a perception of
23 disability. And there is no evidence of that. There
24 is no -- as noted, they didn't perceive him to have a
25 disability. And this was -- plaintiff, supposedly he

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1 was discharged -- which he wasn't, but suppose he
2 was -- it was based on a personality conflict with
3 Dr. Pitcher, as he claimed. So the motivation wasn't
4 there either. It was something other than a
5 perception of disability.

6 And finally, and most importantly perhaps,
7 plaintiff was not constructively discharged. In
8 order to be constructively discharged, the working
9 conditions must be so bad, so horrendous, Your Honor,
10 that the plaintiff can't come in -- a reasonable
11 person would not want to come in to work.

12 And secondly, a constructive discharge
13 cannot solely be based on one discriminatory act.
14 There must be aggravating factors. That was Bennett
15 versus Quark, which was implicitly overruled on the
16 grounds that -- it's still good law on that issue,
17 Stubbs versus The McDonald's Corporation. And it's
18 clear that just because an act -- there was a
19 discriminatory act made at one point, doesn't
20 indicate -- that does not lead to a constructive
21 discharge.

22 And so, in this case, plaintiff is basing
23 his constructive discharge solely on this allegedly
24 illegal medical inquiry, and his quote/unquote
25 discovery that there was supposedly no basis for it.

1 So that's one -- let's assume that it was an illegal
2 medical inquiry for a second, just for argument's
3 sake. That's one discriminatory act; that's not a
4 whole pattern. Plaintiff was coming in to work
5 every -- just one day a month, but he was coming in
6 every month, just like -- I think it was since 2007.
7 And then after the addendum, since 2011, for three
8 years, just kept coming into supposedly intolerable
9 working conditions. And he kept coming in. And he
10 admitted in his deposition that nobody did anything
11 inappropriate to him. And then he gets this
12 affidavit saying, Well -- and in his subjective
13 mind -- and by the way, a constructive discharge
14 claim must be objective. In his subjective
15 interpretation of these documents he said, Oh, they
16 had no reason for it, no reason for the exam. So he
17 felt that his working conditions were somehow
18 affected. But they weren't. He admitted that no one
19 harassed him on the job, no one made things difficult
20 for him to perform his surgeries. There was no
21 discharge. He chose of his own accord to stop coming
22 to UNM, which was his choice. I mean, it's his life.
23 But I mean, he cannot argue that he was
24 constructively discharged because no one did anything
25 to him, Your Honor, other than this one supposedly

1 illegal medical inquiry. But one discriminatory act
2 cannot constitute a constructive discharge.

3 So UNM is clearly -- UNM is clearly
4 entitled to summary judgment as to plaintiff's claim
5 for constructive discharge because he has not met any
6 of the prongs for a constructive discharge claim.

7 Thank you, Your Honor.

8 THE COURT: All right. Thank you,
9 Mr. Marcus.

10 Mr. Norvell, do you want to respond on the
11 constructive discharge claim?

12 MR. NORVELL: Yes, Your Honor.

13 THE COURT: Mr. Norvell.

14 MR. NORVELL: Mr. Marcus is very adamant
15 that one act of discrimination does not constitute
16 grounds for constructive discharge. I don't believe
17 my reading of the law comports with that directly. I
18 believe that the case from which he draws that is a
19 little looser than that, saying that generally
20 speaking. However, that particular case -- and I
21 can't recall which one it was, Your Honor, I
22 apologize -- does not have facts such as the
23 addendum, which is a very severe, very invasive, very
24 broad and per se discriminatory medical inquiry.

25 THE COURT: But that's your one act that

1 you're saying created the hostile environment that
2 constitutes the constructive discharge?

3 MR. NORVELL: I'm not saying it's the only
4 act. But I'm saying if it were taken in isolation,
5 that it would give rise to a question as to whether
6 that singular act was severe enough to give rise
7 to -- regarded as status for Dr. Rivero.

8 Defendant admits, again, for the third time
9 in this hearing that the term "psychiatric" implies
10 severe mental impairment. Their words, not mine.
11 And so, by presenting the psychiatric examination,
12 they're insinuating a severe mental impairment.

13 Couple that with Dr. Schenck's testimony
14 regarding stress; he wanted to reduce the on call, he
15 said, for Dr. Rivero, because stress brought about
16 some disabling factor. This is a question of fact
17 for the jury: Did Dr. Schenck truly perceive Dr.
18 Rivero as being disabled due to reaction to stress?
19 Now, mind you, Dr. Schenck does not take into account
20 the stress involved with Dr. Rivero working full-time
21 without complaint at another hospital, and one day a
22 month traveling across state lines to perform his
23 obligations for UNM.

24 Moreover, with those aspects together,
25 coupled with an environment, yes, there was a

1 conflict between Dr. Pitcher and Dr. Rivero related
2 to a transfer of a patient in 2003. That underpinned
3 an environment of hostility, not necessarily as to
4 the legal term of art, but it underpins the intent
5 and later gives ground to the perception of Dr.
6 Rivero having potentially being regarded as disabled.

7 Dr. Schenck -- well, those are the grounds
8 by which we are basing the discriminatory acts. The
9 constructive discharge, the unbearable working
10 conditions, it's accumulation of several factors
11 related to this perception, is regarded as status of
12 Dr. Rivero as being disabled. The dispute with
13 Dr. Pitcher laid the groundwork.

14 Dr. Schenck, his attitude and treatment of
15 Dr. Rivero throughout, as evidence presents, was one
16 of flip-flop. He went from being his friend to being
17 manipulative, creating a very difficult environment,
18 where Dr. Rivero was unable to trust his own
19 supervisor.

20 Then, when he asked -- with legal basis,
21 when he went to review his documents, he was refused
22 access to them. Dr. Schenck admitted that that was
23 legal, but ultimately he withdrew the addendum,
24 because he felt as though that was an act of
25 aggression, when it was a completely legal act.

1 This environment continued to spiral out of
2 control.

3 The ROIA defenses that Mr. Marcus posited
4 earlier, he said, Well, he could have just filed a
5 lawsuit and gotten the documents. He did file a
6 lawsuit. It was a mandamus action. It sought the
7 documents. They were refused. The ROIA defense was
8 deemed to be frivolous and without merit by the state
9 court.

10 All of these things created an environment
11 of hostility and viciousness toward Dr. Rivero, until
12 such time as a certification by Dr. Trotter and
13 Dr. Bailey said that there were no -- essentially
14 demonstrated there were no documents underpinning the
15 addendum. How could he continue to work in an
16 environment like that, where the addendum -- when
17 he's perceived as being -- possessing a severe mental
18 impairment. Again, defendant's words, not mine. How
19 could he continue when there is no basis for
20 presenting -- subjecting Dr. Rivero to psychiatric
21 examinations?

22 So that's all I have, Your Honor.

23 THE COURT: All right. Thank you, Mr.
24 Norvell.

25 All right. Mr. Marcus, anything else than

1 the constructive discharge?

2 MR. MARCUS: I just have a couple of
3 things, Your Honor.

4 First of all, plaintiff's alleged success
5 in Oklahoma is irrelevant. We do not know the
6 details of his career in Oklahoma. So I think that
7 that should not be considered. We're considering his
8 behavior and what happened to him in New Mexico.

9 Secondly, the mandamus action should not be
10 considered. That's a subject of a prior pending
11 action. So there is no -- what UNM did regarding the
12 documents, well, that's being dealt with by the state
13 court, and I don't think it has any relevance. It
14 certainly wasn't an act of constructive discharge.
15 UNM was simply acting out of abundance of caution.
16 The plaintiff has no evidence they were doing this to
17 try to get him to quit or discharged in any way.

18 Secondly, yes, we did use the word
19 perceived as having a severe mental impairment. But
20 we said he wasn't perceived as having a severe mental
21 impairment. Plaintiff's counsel is twisting
22 everything around.

23 We did raise the issue in the motion in
24 limine -- maybe that's what plaintiff's counsel is
25 discussing -- but we're discussing how the word

1 "psychiatric" -- the connotations of the word
2 "psychiatric" would be received by the general
3 public, by a jury; not by people who understand the
4 issues well, people who are in the business of
5 psychiatry and psychology. They're not that
6 different from each other regarding the evaluations.

7 So there was no --

8 THE COURT: Mr. Marcus, I don't want to
9 rush this, but I do need to give Ms. Bean a break to
10 rest her fingers. Can we take about a 15-minute
11 break, and then I'll let you finish up on your
12 motion.

13 MR. MARCUS: Thank you, Your Honor.

14 THE COURT: All right. We'll be in recess
15 about 15 minutes.

16 (The Court stood in recess.)

17 THE COURT: All right. Mr. Marcus, do you
18 wish to continue your thoughts on the constructive
19 discharge?

20 MR. MARCUS: Thank you, Your Honor.

21 Where I left off, I believe that he was
22 saying that Dr. Schenck was -- he claimed that he was
23 manipulative. Where is the evidence of that? There
24 is no evidence anywhere. There is nothing in the
25 briefing that Dr. Schenck was being manipulative.

1 There is no evidence of any of that. The addendum
2 was revoked after he got one -- Dr. Schenck gave him
3 one extension, and then eventually revoked the
4 addendum after he continued to refuse to sign it.
5 And all of that was in 2011. And the plaintiff
6 stayed -- he stayed in his position for the three
7 years after that, Your Honor.

8 And there is substantial case law that for
9 there to be constructive discharge, there is no
10 statute of limitations argument, because of Green v.
11 Brennan. But you can't just stay in position for
12 more than a reasonable amount of time, and then claim
13 constructive discharge. And usually this reasonable
14 amount of time is a month or even less than a month.
15 There is no precedent, Your Honor, for allowing a
16 claim of constructive discharge for somebody who had
17 been where the last quote/unquote act of
18 discrimination took place three years prior to him
19 leaving. Yet, he continued to show up for work for
20 three years after that. And admitted that no one did
21 anything inappropriate to him.

22 Plaintiff is simply basing his claim for
23 constructive discharge on this one alleged act, which
24 even if it were improper -- which it's not -- it's
25 clear that Bennett versus Quark, the case law is

1 clear on this, there is no fussiness. A
2 discriminatory act can be part of an act of a
3 constructive discharge, but it cannot constitute the
4 whole thing. And plaintiff is essentially basing his
5 one claim of constructive discharge on this one act
6 and his subjective interpretation of that act years
7 after the fact, after he received the documents. If
8 things were so bad, why did he stay for three years?
9 And then he ended up staying four months after, by
10 the way. He didn't show up, but he didn't tender his
11 resignation. He stayed on the payroll for another
12 four months.

13 So there is just no evidence, Your Honor,
14 of any improper act that would be sufficient to
15 constitute a constructive discharge.

16 Thank you, Your Honor. I have nothing
17 other than that. Thank you very much.

18 THE COURT: Let me ask you, on the premise
19 of, I think, the plaintiff's constructive discharge
20 is that, you know, you're labeling him as disabled.
21 You're saying you didn't, because the FTE, the
22 documentation said he was not disabled. But when you
23 come in and require a psychological exam, aren't you
24 saying a person has a problem? I mean, to start
25 requiring as part of their job -- and you're saying

1 it's a business necessity and it's job related, when
2 you single out this person and say they've got to go
3 to a psychological examination, aren't you in some
4 way saying that person is disabled in a psychological
5 way?

6 MR. MARCUS: Well, I think you're saying
7 that there is a problem, certainly; I agree with
8 that. But there is a difference between a problem
9 and a problem that limits or substantially limits a
10 major life activity. And that's the standard for
11 disabled.

12 THE COURT: But isn't that a very fine line
13 to draw, the university saying that this is -- this
14 psychological examination is job related, it's a
15 business necessity, and yet say he's not disabled and
16 it's not impacting or impairing life activities?
17 That's a thin line to draw, isn't it?

18 MR. MARCUS: It may be a fairly thin line,
19 but I think it certainly comes along -- in this case
20 it falls on the side they realize he had a problem
21 with his professionalism, but it's not a limitation
22 of a major life activity. Because even an inability
23 to do a certain job, that doesn't necessarily mean
24 that you're substantially limited, or limited in the
25 life activity, major life activity of working, Your

1 Honor.

2 THE COURT: All right. I've chopped up
3 your argument on your motion. Anything else you want
4 to say on your motion?

5 MR. MARCUS: I think that's it. Thank you.

6 THE COURT: All right. Mr. Norvell, I've
7 chopped up your arguments on this motion as well. Do
8 you have anything else you want to say on this
9 motion?

10 MR. NORVELL: Yes, Your Honor.

11 Are we talking about constructive
12 discharge?

13 THE COURT: Well, anything on the motion.
14 If you want to talk about constructive discharge. I
15 just chopped everybody's up to try to get a handle on
16 all the parts of it. But I want to give you a chance
17 to say anything you want to on this motion, even if
18 it doesn't fit into my questions or scheme.

19 MR. NORVELL: Sure, I appreciate that, Your
20 Honor.

21 One of the points that I first mentioned,
22 was that UNM would portray Dr. Rivero as a consummate
23 unprofessional, to coin a non word. But he's a
24 consummate professional. His colleagues -- record
25 testimony from colleagues he worked with for 15 years

1 plus state that he never acted unprofessionally; that
2 patients loved him and ask for him to this day; that
3 he was a fantastic mentor to -- for example,
4 Dr. Deana Mercer, who is now senior faculty at UNM in
5 this department; that he saw thousands of patients
6 over a 15-year period before he reduced his time, and
7 then continued to see patients who were awake and
8 interactive with him when he was operating on high
9 value surgeries during his one day a month
10 obligations after 2007.

11 There is no allegation of unprofessional
12 behavior prior to an assertion by Dr. Schenck, which
13 was unsubstantiated in 2009. He's never been sued.
14 He's never been reported to the Medical Board. If he
15 was such a problem as to warrant a psychiatric
16 examination, why did UNM continue him to allow to
17 operate on anyone? This one day a month argument,
18 are those patients not as available as those that
19 might be around during the rest of the week? It just
20 doesn't stand. His professionalism is consummate.

21 He is -- the arguments that these
22 complaints had merit fails. They were never
23 investigated. And they just do not have merit. I'd
24 also like to point out, and this is in the record,
25 when Dr. Rivero left UNM and reduced his time to .05

1 full-time employment, one day a month, Dr. Schenck
2 didn't want him to go. His colleagues -- 23 of his
3 colleagues also emphasized they didn't want him to
4 go. He was highly valued. And they're purporting --
5 UNM is purporting that this is at the same time that
6 so many complaints were coming in that warranted a
7 psychiatric examination. It simply does not hold
8 water.

9 Finally, Mr. Marcus' statement that UNM
10 does not know what other hospitals were doing, that's
11 untrue. Every two years his hospital at which he was
12 working in Oklahoma would provide information as to
13 his status, as to his credentials, to UNM. And there
14 was nothing, nothing that would give rise to these
15 arguments of unprofessionalism.

16 Emphasize again, the complaints -- certain
17 of the complaints from patients were rebutted in
18 writing by physicians who were present. So none of
19 these arguments really hold water as to his
20 professionalism. And I would just like to emphasize
21 that.

22 And finally, on the end of the Green versus
23 Brennan, discrimination aspect of it, I would hope
24 that the Court would review that case one more time.
25 Because constructive discharge stemming from the

1 discriminatory act states that the two-step process
2 is no longer one that's to be used, where a case is
3 filed on discrimination, and then amended to include
4 constructive discharge, when constructive discharge
5 is filed the discrimination claim is incorporated.
6 And that plays into the statute of limitations
7 argument.

8 THE COURT: Is the standard for -- I have
9 less experience with these Rehabilitation Act claims
10 than I do with just standard Title VII claims, which
11 I have many of those. Is the definition and are the
12 cases the same for constructive discharge? Is the
13 standard the same for Title VII as it is for
14 rehabilitation claims?

15 MR. NORVELL: The Title VII claims, Title
16 VII claims differ with respect to exhaustion of
17 administrative remedies, and you'll see that in Green
18 versus Brennan.

19 THE COURT: Right.

20 MR. NORVELL: In terms of the general
21 applicability of the standard, it's more -- it's the
22 same.

23 THE COURT: The standard is the same. I
24 know that the administrative procedures are
25 different, but --

1 MR. NORVELL: Right.

2 THE COURT: All right. Let me follow up
3 then.

4 My impression, though, is that it's got to
5 be an intolerable situation. Isn't it difficult to
6 make that standard when you just have this sort of
7 single condition that is floating around over three
8 years, that they're wanting him to have a
9 psychological examination, but yet he continues to
10 work?

11 MR. NORVELL: I don't think it's a single
12 condition. I think there are aggravating
13 circumstances surrounding the presentation of the
14 addendum, the conduct of the administrators with
15 respect to Dr. Rivero's request for documents, their
16 impeding his access, his legal access to his own
17 personnel file, his credentialing file, the
18 obstruction through frivolous litigation, the
19 accusations by Dr. Schenck of unprofessional conduct,
20 the pervasiveness of that throughout UNM, I think,
21 that aggravates the circumstances of the presentation
22 of the psychiatric examinations, and the other
23 elements with respect to Dr. Schenck's belief that
24 stress was hindering Dr. Rivero's performance of his
25 work. Dr. Rivero's -- the stress of call was

1 creating an impediment to the major life activity of
2 working for UNM.

3 THE COURT: All right. Anything else, Mr.
4 Norvell?

5 MR. NORVELL: No, Your Honor.

6 THE COURT: Thank you, Mr. Norvell.

7 I'll give you the last word on this motion,
8 Mr. Marcus.

9 MR. MARCUS: Thank you, Your Honor.

10 A consummate professional doesn't respond
11 to notice of criticism by attacking the messenger. A
12 consummate professional doesn't threaten this
13 messenger's employment by threatening to report him
14 to his supervisors. A consummate professional
15 doesn't overreact and say he's not going to speak
16 Spanish anymore to anybody or see patients of a
17 particular clinic, and put it in writing. A
18 consummate professional doesn't refuse to be tested
19 for antibiotic resistant bacteria. These are just a
20 few of the issues that UNM had concerns about
21 regarding Dr. Rivero. And UNM was absolutely correct
22 in requiring the plaintiff as a condition of his
23 increased hours to submit to a psychological
24 evaluation.

25 Secondly, the patients that -- in his

1 deposition Dr. Rivero stated that the patients that
2 he operated on one day a month, he was either
3 assisting another surgeon or patients with whom he
4 had a preexisting relationship, who he got along
5 with.

6 No one disputes that Dr. Rivero didn't have
7 some friends in the department. But he did some
8 troubling actions, and UNM wanted to figure out what
9 was going on before allowing him to be there
10 full-time.

11 And Green versus Brennan, it continues the
12 idea -- it continues to state the circumstances must
13 be so intolerable that a reasonable person would
14 resign. And his staying there for three years, it
15 strains credibility, Your Honor.

16 And I don't really see the issue that you
17 can't amend the complaint, that you can't bring a
18 complaint first for an act of discrimination,
19 especially when the constructive discharge is based
20 on the same act of alleged discrimination. It just
21 appears to me that plaintiff is attempting to use a
22 constructive discharge as an end run around the
23 statute of limitations problem, with his claim for
24 the allegedly illegal medical inquiry.

25 Thank you very much, Your Honor.

1 THE COURT: All right. Thank you,
2 Mr. Marcus.

3 Well, my impression -- and I alluded to
4 this earlier -- is that there are a lot of facts
5 here, and I think most of the facts are the other
6 side saying they're irrelevant, or they're immaterial
7 to the issues here. But my impression of what I've
8 been able to study is that for the most part there is
9 not going to be a factual issue that keeps the Court
10 from getting to the legal issues here. So I'm
11 inclined to think that the facts here are largely
12 undisputed, the genuine issues are largely
13 undisputed. So we can get to the factual issues.

14 I'm not quite understanding -- on the
15 statute of limitations issue, I'm not seeing in my
16 mind how the production of the records is the
17 operative event for the cause of action under the
18 Rehabilitation Act. So I probably will be reviewing
19 Judge Lynch's decision. And even if it was my
20 decision, if I had been on the case at the time, I'd
21 be relooking at it on a summary judgment. So that's
22 not unusual. But I'm not quite understanding from
23 what I've read so far why the operative date would be
24 the production of the documents.

25 I don't have much of an inclination on the

1 merits of the condition claim. I need to study it.
2 As I said in my questioning to Mr. Marcus, I'm not
3 quite certain how the department can require
4 psychological evaluations and then say he's not
5 disabled. Maybe they can. But I need to look at
6 that a little bit.

7 I'm not -- I'm leaving the bench not really
8 thinking that this is going to rise to constructive
9 discharge. But let me give that some thought. Let
10 me review the facts and make sure that I'm
11 considering them all. But my impression in the past,
12 when I've dealt with the Title VII actions is it's
13 got to be more severe than what I'm seeing or hearing
14 here. But I'll try to work on this and get you an
15 opinion out as soon as possible. So I know this will
16 help with the rest of the things that we have to do
17 to get this case on-track.

18 Talk to me a little bit before we plunge
19 into the remaining motions where this case is. As
20 some of you may know, I've been doing a little bit
21 differently how -- my case management while I've been
22 in these prison gang cases down in Las Cruces. I've
23 had two seven-week trials here, the first half of the
24 year, and I'm about to go into another four-week
25 trial. So for the first time in my career I've been

1 having the magistrate judges handle my scheduling and
2 discovery matters and things like that. Is this
3 case, does it have -- well, talk to me about where we
4 are. Where are we on discovery? We're here on this
5 motion, this hearing today. Do we have a pretrial
6 conference set up? Do we have a trial date? Where
7 are we on those sort of things?

8 MR. NORVELL: There is no trial setting,
9 Your Honor. Discovery is over. We haven't had a
10 pretrial conference. The pretrial order was
11 submitted and filed by both parties a couple months
12 ago, I think.

13 THE COURT: So you're past that?

14 MR. NORVELL: Yes.

15 THE COURT: So you need a pretrial
16 conference, then you need a trial date?

17 MR. NORVELL: Yes.

18 THE COURT: Now, I want to leave a little
19 bit of time for me to work on these motions,
20 particularly given that I'm going into another
21 four-week trial starting July 9. What are you
22 thinking of, as far as what would the plaintiff want
23 as far as a pretrial conference date and a trial
24 date?

25 MR. NORVELL: In terms of when it will at

1 occur?

2 THE COURT: Yes. That will keep my feet to
3 the fire in getting these opinions out, so that you
4 get your case on-track.

5 MR. NORVELL: Well, I guess it's dependent
6 upon --

7 THE COURT: Because, normally, I don't, if
8 I'm handling my own case management, have cases that
9 don't have those two dates. So this one is a little
10 bit different, in the sense that we don't have those
11 established. Because I guess this is the first time
12 we've all gotten together on this case, if I'm
13 correct.

14 MR. NORVELL: That is correct. We've been
15 in front of Judge Yarbrough a few times.

16 THE COURT: What have you been in front of
17 him on?

18 MR. NORVELL: Motions to compel.

19 THE COURT: Discovery issues? Okay.

20 MR. NORVELL: Yes, with respect to trial
21 setting, I think where the parties are -- maybe
22 Mr. Marcus can speak to this as well -- is that we,
23 at the behest of Judge Yarbrough, we've exchanged
24 settlement demands, and we're waiting to see the
25 outcome of this particular motion, this set of

1 motions, to determine what's next. When would trial
2 be possible? I would think that, you know, 120 days
3 after ruling on this. Is that too far out for Your
4 Honor, or do you typically have a different standard
5 after a ruling on a motion for summary judgment, we
6 proceed to trial?

7 THE COURT: Yeah, I usually squeeze time
8 out more than that. I guess what I would prefer to
9 do is keep my feet to the fire, is try to get you a
10 ruling as soon as possible. But I guess I'd like to
11 leave here this morning setting a pretrial conference
12 and a trial date, so that we're all pushing toward
13 that. I think -- I don't think cases operate very
14 well if they don't have trial dates.

15 MR. NORVELL: I would agree with that.

16 THE COURT: So if that's the case, what
17 would you want as far as a pretrial conference and a
18 trial date? What timeframe?

19 MR. NORVELL: Well, if we work backwards
20 from a trial date, perhaps -- where are we now?
21 We're in June. I'm thinking about my schedule six
22 months out. That puts us into December or January.
23 Are those viable dates for the Court, or are you
24 crunched up there as well?

25 THE COURT: I don't know. It seems like I

1 have a large trial later this year, about a
2 three-week trial, but it's a bench trial. But I
3 can't remember. I think it's the end of October and
4 early November. That's the Jemez case. Is that late
5 October, and then the first two weeks in November.
6 So what would be your preference? When do you want
7 to try this case?

8 MR. NORVELL: One moment. Maybe push
9 toward the end of the year December, or the first
10 part of next year, January.

11 THE COURT: All right. Does the trial date
12 of, say, putting it early December work for you,
13 Mr. Marcus?

14 MR. MARCUS: Let me consult with my
15 calendar here. Your Honor, end of December would
16 work for us.

17 THE COURT: Okay. What are we looking at?

18 THE CLERK: Looks like you have a case on
19 the 10th.

20 THE COURT: Is that just my trailing
21 docket?

22 THE CLERK: It's a criminal case: Baker,
23 two defendants, Your Honor.

24 THE COURT: Okay.

25 THE CLERK: The 3rd is clear, as is the

1 17th, Your Honor.

2 THE COURT: So you're pointing to the 10th,
3 is the one --

4 THE CLERK: That has a setting.

5 THE COURT: So I'm thinking about how long
6 the trial would last. How long do you think the
7 trial would last, Mr. Norvell?

8 MR. NORVELL: I believe we previously said
9 five days.

10 MR. MARCUS: It was something along those
11 lines, Your Honor.

12 THE COURT: Why don't I give you the week
13 of the 3rd then. We'll set aside the week of the
14 3rd. And then backing up from that, when do you want
15 the pretrial conference, Mr. Norvell?

16 MR. NORVELL: What would you recommend,
17 Your Honor?

18 THE COURT: A couple of weeks before --
19 you've already filed motions in limine, which is a
20 little unusual to have your motions in limine so
21 early, but --

22 MR. NORVELL: They're not all of them, I'm
23 sure.

24 THE COURT: Yeah, that probably is the
25 case.

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1 MR. NORVELL: That's Thanksgiving time, so
2 what's the week before Thanksgiving? Are you in
3 trial at that time?

4 THE CLERK: Looks like your bench trial,
5 Judge.

6 THE COURT: When does that end?

7 THE CLERK: It ends on the 16th of
8 November. You have Red Hair on the 19th.

9 THE COURT: Is that a trial?

10 THE CLERK: Yes, Your Honor. Red Hair
11 versus USA. It's a civil, that's on the 19th. I'm
12 guessing the 12th is Veterans Day.

13 THE COURT: Yeah, probably.

14 THE CLERK: I don't know about the Red Hair
15 trial, but --

16 THE COURT: Why don't we do this: I might
17 have to adjust it, but would the 20th work for you?

18 MR. NORVELL: Sure.

19 MR. MARCUS: Your Honor, I think that would
20 work.

21 THE COURT: All right. So let's do it at
22 8:30 on November 20. So I'll set the pretrial
23 conference and also set a trial date.

24 Now, with regards to the motion I just
25 heard, because of the age of that, I'm going to try

1 to get that done by the end of September, because
2 otherwise, it's going to start showing up on my six
3 month list. So I'm going to be motivated highly to
4 get you a ruling. It may not constitute a full-blown
5 opinion, but I'll try to get you a ruling by the end
6 of September. So that's kind of a drop-dead deadline
7 for me. I hope I can work it in and get you a full
8 opinion before that. But given I'm about to
9 disappear into a four-week trial, everything is going
10 to get a little harder.

11 THE CLERK: The start time of the trial?

12 THE COURT: The jury will be 9:00, but
13 everybody else, all of us will be in at 8:30 to see
14 what we need to discuss before the jury comes in.

15 All right. Shall we go, then, to the
16 motion in limine to exclude complaints against the
17 plaintiff prior to 2006? Do you want to take that up
18 next, or is there another one that you want to take
19 up? I believe you've got a couple of motions here,
20 so I'll let you dictate, Mr. Norvell.

21 MR. NORVELL: We can do that one first.
22 That's fine.

23 THE COURT: All right. We'll do that one
24 then.

25 MR. NORVELL: These are fairly

1 straightforward I think, and the discussion is pretty
2 clear in the briefing. Dr. Rivero has moved to
3 exclude complaints prior to 2006. And certainly
4 complaints that are so remote in time as to go back
5 to 1992, we believe they would be unfairly
6 prejudicial, and do not constitute material facts
7 that would be relevant to a jury.

8 In the motion for summary judgment,
9 defendant lays out a series of facts and discusses
10 incidents prior to 2003. And then at a certain point
11 says, Well, Dr. Rivero was reformed until there were
12 more complaints that came in. This seems to be an
13 approach that would -- those older complaints would
14 simply prejudice a jury, try to paint Dr. Rivero in a
15 bad light, to cherry-pick and misrepresent Dr.
16 Rivero's conduct long before the material issues that
17 are in front of the Court with respect to the motion
18 for summary judgment and the merits that are going to
19 be discussed at trial.

20 For example, Dr. Rivero was promoted to
21 professor in 2005. I would argue that any complaints
22 prior to that are not material because he was
23 promoted to professor without any complaints; that
24 there was no discipline or suspension.

25 Now, the defendant claimed that, Well, Dr.

1 Rivero just went into a 10-year acting job and
2 suddenly reverted to form. There is no basis for
3 that. As I've said all day there is no basis for the
4 complaints. But it's preposterous to claim a 10-year
5 acting job of good behavior, and then suddenly say,
6 Oh, he's misbehaving, and go back in time and say,
7 look, this started way back in 1992. I think it's
8 pretty straightforward. We could ask that the Court
9 limit any timeframe in discussion of complaints with
10 respect to Dr. Rivero.

11 THE COURT: So you're making a 403 argument
12 for a cut-off of 2006?

13 MR. NORVELL: Yes, Your Honor.

14 THE COURT: All right. Thank you, Mr.
15 Norvell.

16 Mr. Marcus.

17 MR. MARCUS: Your Honor, complaints made
18 against Dr. Rivero -- unprofessional behavior on the
19 part of Dr. River prior to 2006 are highly relevant
20 to this case. First of all, there was a substantial
21 increase in complaints regarding his lack of
22 professionalism as early as 2003. So anything that
23 happened in 2006 was a continuation of a pattern that
24 began -- that started ramping itself up again in
25 2003. So certainly anything after 2003 is relevant.

1 It's all part of the same pattern, and part of the
2 same rationale for the addendum.

3 Secondly, plaintiff's behavior prior to,
4 let's say, in the 1990s, puts a whole different spin
5 on his behavior in the 2000s. I'm not saying it's an
6 acting job. I don't think I ever used that
7 terminology. But it certainly makes it seem like his
8 period of relative calm in, like, the early 2000s,
9 maybe late '90s, very early 2000s, was more of an
10 anomaly, in that perhaps he was okay then, but he was
11 reverting back to an earlier lack of professionalism.
12 It certainly is something that a finder of fact can
13 consider in determining whether the addendum was
14 relevant. So it creates -- it puts a whole
15 different -- whether the addendum was appropriate,
16 whether UNM acted appropriately in issuing it and
17 requiring it as a condition of him staying for --
18 sorry, coming back to work full-time. He had no
19 problem staying at the .05 FTE before coming back.

20 Also, perhaps most importantly, it's not so
21 much what he did in the 1990s, in 1993, 1994, it's
22 how he responded to it when he was questioned about
23 it. He didn't say, Look, I made some mistakes in the
24 past. I wasn't so experienced. I needed to improve
25 my professionalism over the years. I needed to work

1 on this. He didn't say that.

2 For instance, there was an issue in 1993,
3 in which he -- there was a letter stating that he
4 unleashed a 10-minute barrage of extreme obscenities
5 to residents. And he said, Well, that's just locker
6 room talk. He didn't try to say that he was working
7 on things. He has no remorse whatsoever. And lack
8 of remorse, I think, is a major issue in this case.
9 He's showing no intent to improve himself or improve
10 his professionalism.

11 The other issue was that he refused to be
12 tested for MRSA, methicillin resistant staph
13 infections. He said, Well, they were going to put
14 something up my nose. He was really offended by
15 that. In his deposition, in 2017, he said, "I don't
16 want to do that. There is no reason for me to do
17 that. It's an invasion of my privacy," in front of
18 the residents. No, can't do that. Never mind the
19 fact that resistant infections kill tens of thousands
20 of people in hospitals every single year. Yet he
21 stood by his decision, rather than say, I made a
22 mistake. He refuses to admit that he made a mistake.
23 And that is where I think the evidence is most
24 relevant. Thank you, Your Honor.

25 THE COURT: All right. Thank you, Mr.

1 Marcus.

2 Anything else on that motion you want to
3 say, Mr. Norvell?

4 MR. NORVELL: Real quickly, Your Honor.

5 THE COURT: Certainly.

6 MR. NORVELL: The gap in time in UNM's
7 statement of facts in the motion for summary judgment
8 is between 1994 and 2003. Where is there a pattern
9 when there is a decade of nothing whatsoever?

10 Additionally, the two incidents that
11 Mr. Marcus cited to, again cherry-picked and framed
12 in way that would most benefit UNM and shed the worst
13 light possible on Dr. Rivero, the barrage of
14 obscenities. That was a disagreement in which two
15 employees certainly admittedly swore at one another.
16 And on the record Dr. Rivero stated, "Yes, we did,
17 but we understood it, and we're friends. We became
18 friends. We are good friends to this day."

19 With respect to the refusal to take the
20 MRSA test, the individual administering that
21 interfered with Dr. Rivero's clinical rounds. In
22 addition, Dr. Rivero has no pattern of MRSA
23 infection. They barged in, interfered with his work.
24 He had no pattern of MRSA infections, and had a low
25 infection rate overall. Because Dr. Rivero refused

1 that, later it was shown that, well, because he has
2 no pattern, we don't need to test him. He rightfully
3 refused. If someone were to barge into the courtroom
4 today and attempt to test Your Honor for MRSA, it
5 would seem to be improper. His reaction to that, I
6 think, was justifiable.

7 These incidents are nonsensical to be
8 brought up from the early '90s. With respect to the
9 others, it is dubious as to their value prior to
10 2006, which seems to be the time at issue in this
11 case. And, therefore, anything prior to that would
12 create confusion, undue prejudice, and those other
13 elements in 403.

14 THE COURT: All right. Thank you, Mr.
15 Norvell.

16 At the present time, I'm not inclined to
17 keep complaints out. It seems to me that it would
18 probably be the best for the jury to have a robust
19 record, and y'all explain it to the jury rather than
20 me sort of putting my thumb on the scale and keeping
21 it out. The defendant's story is that it's this long
22 history of complaints that caused them to do what
23 they did. And I think for me to chop it up would not
24 necessarily be fair to them. So I think I'll
25 certainly give it some more thought, and review some

1 of the exhibits to make sure I understand all the
2 complaints. But at the present time, I'm not
3 inclined to grant this motion and limit the evidence
4 that the defendant can put on.

5 All right. So the next motion is for
6 summary judgment as to certain of the defendant's
7 affirmative defenses. Mr. Norvell, do you want to
8 speak to that motion?

9 MR. NORVELL: Do we want to tackle the
10 other motion?

11 THE COURT: You can. Which one do you want
12 to pick up next?

13 MR. NORVELL: The use of the term
14 psychological instead of psychiatric.

15 THE COURT: Okay.

16 MR. NORVELL: Again, a pretty
17 straightforward piece. Dr. Rivero would ask that the
18 Court limit and restrict the use of the word
19 psychological in reference to the type of examination
20 that's at issue in this case. The connotative
21 implications of psychological attempt to mollify the
22 actual facts of this case, which are that UNM
23 presented a psychiatric exam. Psychiatric differs in
24 connotation from psychological. It is the word that
25 is used 15 times in the addendum. There is no use of

1 the term psychological. Psychiatric, as defendants
2 admit, gives rise to the implication of a severe
3 mental disorder. They wrote the addendum. They
4 should stick to what they chose as the wording for
5 it, and the type of exam. They're essentially
6 saying, Well, it's more neutral, therefore, it would
7 benefit us and represent more of our intent. Well,
8 the intent is in the words that were chosen to be
9 placed in the addendum. That word was psychiatric,
10 not psychological. To mollify it is to create
11 confusion and undue influence on the jury when
12 considering the severity and the starkness of the
13 addendum with respect to Dr. Rivero's reaction, and
14 the illegality of the inquiry under the
15 Rehabilitation Act.

16 That's all I have, Your Honor.

17 THE COURT: All right. Thank you, Mr.
18 Norvell.

19 Mr. Marcus.

20 MR. MARCUS: Thank you, Your Honor.

21 The terms psychology and psychiatry in the
22 clinical sense are fairly interchangeable.
23 Psychologists can do almost everything that
24 psychiatrists can do, except prescribe drugs. And
25 there is no evidence in the -- so there is no

1 evidence in the addendum that UNM thought that the
2 plaintiff needed to start taking medications. So in
3 terms of psychology versus psychiatry, there is very
4 little distinction in the clinical sense -- sorry, as
5 far as the term of art as it's understood by people
6 in the mental health area. Psychiatry, psychology,
7 they're very similar. The main difference is
8 psychiatrists have a medical degree. That's really
9 the only difference.

10 However, in the connotative sense for lay
11 people, for most of the potential jurors, psychiatry
12 has an extremely powerful connotation that it
13 indicates a severe condition. This isn't necessarily
14 what it means in the clinical sense. But among the
15 general public it means a severe condition. And I
16 think that -- I would argue that UNM has the right to
17 use a more neutral term, if it so chooses to use the
18 term psychology, which has a more neutral
19 connotation. UNM has the right to use a more neutral
20 term to try to avoid having a jury reach a decision
21 based solely on emotion. That's the main purpose of
22 403, prevent a jury from reaching a decision just
23 based on emotion. And UNM's attempt to use a more
24 neutral term like psychology is clearly an attempt to
25 avoid that, to get the jury to think about it in a

1 more reasonable manner.

2 Thank you very much. That's all I have to
3 say.

4 THE COURT: Well, is there any evidence
5 that's going to be presented that the department
6 wanted Dr. Rivero to undergo any psychological tests?
7 I mean, the wording of the addendum was a psychiatric
8 evaluation; correct?

9 MR. MARCUS: Yes. But it was to be done by
10 a board certified psychiatrist. But I think UNM -- I
11 don't think there was any real intent behind that,
12 that he needed to have being administered drugs, or
13 anything. I think it was a board certification
14 psychiatrist that may be more stringent than a
15 psychologist.

16 THE COURT: It seems to me that if there is
17 no evidence that the defendant was wanting him to
18 undergo psychological evaluation -- if there is some
19 evidence of that, then it seems to me I shouldn't be
20 precluding its use. But it seems to me that for
21 the -- to allow the university to talk about a
22 psychological evaluation, if there is no evidence of
23 that, would be introducing an issue that could be
24 misleading. If all the evidence is that they were
25 demanding that he have a psychiatric evaluation,

1 seems to me that's what we ought to be talking about.

2 MR. MARCUS: Well, but a psychological
3 evaluation is basically -- they're very similar,
4 personality test. But this sort of test can be
5 conducted by a psychologist or a psychiatrist. And
6 UNM chose to have him talk to a psychiatrist. But
7 those personality evaluations can be done by either.

8 THE COURT: Well, all right. Thank you,
9 Mr. Marcus.

10 Mr. Norvell.

11 MR. NORVELL: Thank you, Your Honor.

12 Your Honor, the addendum does not specify a
13 personality test or anything like that. It's
14 psychiatric examination by a board certified
15 psychiatrist. Board certified psychiatrist is
16 necessarily an M.D. or a D.O. And Dr. Rivero was
17 required to accept the psychiatrist of their choosing
18 and accept the treatment recommendations without
19 complaint. And part and parcel of it is by changing
20 the wording, it changes the actual meaning of the
21 document itself.

22 How would Dr. Rivero have perceived this
23 document, which is really -- how would anyone
24 objectively perceive this document? It doesn't say
25 psychological, and there is no implication anywhere

1 in the record that psychological evaluations would be
2 used, personality tests, anything like that. There
3 is no specification of a type of exam. It is a
4 psychiatric or part psychiatric evaluation.

5 THE COURT: All right. Thank you, Mr.
6 Norvell.

7 Well, it seems to me that for the defendant
8 to start characterizing the psychiatric evaluation as
9 a psychological exam is a bit argumentative. I'm not
10 going to preclude the defendant from arguing that, if
11 they want to argue it and explain it to the jury.

12 But I do think that defendant shouldn't in
13 questioning, opening arguments, and things like that,
14 use that word psychological, and replace psychiatric
15 with the word psychological evaluation. So I think
16 that, at least in openings, and in questioning before
17 the jury we should be using the word "psychiatric."

18 If you want to have a witness explain what
19 you just explained to me, Mr. Marcus, that there is
20 not a great deal of difference, if you want to
21 explain the testing and those sort of things, and
22 explain that it's no different than psychological
23 testing, a psychologist could have done it; the
24 university chose a psychiatrist, I think that's all
25 fair game. And I think, then, in closing arguments

1 you can call it what you want; that you were really
2 requiring no more than a psychological evaluation.
3 But I think that it is a bit argumentative, and it's
4 not squarely in the facts, given that it looks to me
5 like the university was requiring a psychiatric. So
6 when you use that word, I'll consider it to be
7 argumentative, and you'll need to use it there. But
8 you are the free to explain to the jury, and in
9 opening. If you're going to explain it to the jury
10 you can to explain what the evidence will show.

11 Is that sufficiently clear to everybody
12 what I'm requiring there?

13 MR. NORVELL: Yes, Your Honor.

14 MR. MARCUS: Yes, Your Honor.

15 THE COURT: I'll take a look at it, but
16 that's what I'm inclined to rule on that one.

17 All right. Now, we want to take up your
18 affirmative defense motion, Mr. Norvell?

19 MR. NORVELL: Yes, Your Honor. Part and
20 parcel of the motion to strike affirmative defenses
21 relate to the statute of limitations defense. I
22 think we've discussed that narrowly substantially,
23 so --

24 THE COURT: You think I can probably rule
25 on that portion of your motion at the same time I

1 rule on the other, and just put those in the same
2 opinion?

3 MR. NORVELL: Because they constitute
4 essentially cross-motions.

5 THE COURT: Okay. All right.

6 MR. NORVELL: Let's see, I don't want to
7 belabor too much of these particular motions, and
8 more or less stand on the briefing.

9 Perhaps there is some confusion between the
10 defendant and I as to affirmative defenses 1 and 3 as
11 they apply to constructive discharge. Essentially,
12 the argument is that -- of defense is that plaintiff
13 failed to state a claim with respect to constructive
14 discharge. And going back to the motion, the claims
15 are barred by the Doctrine of Laches and Waiver.
16 Now, defenses 1, 2, and 3, I applied them generally
17 to the statute of limitations argument. But also
18 there is the constructive discharge application that
19 the defendant has stated. While there has been no
20 claim for constructive discharge and they're barred
21 by the Doctrine of Laches and Waiver, my position is
22 that there has been no evidence to show that, and
23 that the motion to dismiss stage, in fact, you know,
24 did say that a claim was adequately stated for
25 constructive discharge.

1 Now, Judge Lynch cited the burden of proof
2 and the level of that burden at that time. But
3 nonetheless, it never came down.

4 With respect to the statute of limitations
5 and to the constructive discharge claim, I would like
6 to assert that affirmative defense 1 is void and
7 should be stricken. And with affirmative defense 3
8 plaintiff's claims are barred by the Doctrine of
9 Laches and Waiver. There is really no evidence or
10 sound argument with respect to that. So I would ask
11 that the Court consider striking that defense as it
12 applies to constructive discharge.

13 Moving to defense 13, "At all times UNM
14 acted in accordance with its policies and regulations
15 and applied such policies and regulations
16 consistently and fairly." Dr. Rivero moves to strike
17 that defense because UNM stated that it had no set
18 policy with regard to the administration of the
19 addendum or psychiatric evaluations.

20 They provided a boatload of policies, but
21 they had none that were applied by any administrator
22 with respect to the addendum, and no witness could
23 testify to actually referring to or applying those
24 policies. And, therefore, I would ask that that
25 defense be stricken.

1 With respect to defense 4, "Defendant UNM
2 fulfilled any and all obligations it had to plaintiff
3 under contract or statute." UNM simply had stated
4 that it would supplement that particular defense and
5 cited to other defenses above. In my opinion, that's
6 inadequate. That doesn't fulfill the requirements of
7 giving a fair sense of how that defense applies.
8 And, therefore, I ask that it be stricken.

9 I think defense 15 is off the table because
10 that's really a mere statement of a reservation of
11 right to amend the complaint or to amend the answer
12 to the complaint. Therefore, it's not really a
13 defense, and I would ask it be stricken as well.

14 I believe that's all I have. Anything I've
15 missed in the briefing, those are more or less
16 perfunctory things that Mr. Marcus and I have agreed
17 upon, and probably memorialized in the briefing
18 itself.

19 So that's all I've got, Your Honor.

20 THE COURT: All right. Thank you, Mr.
21 Norvell.

22 Mr. Marcus -- let me ask Mr. Norvell one
23 question, and I'll be asking Mr. Marcus the same
24 question.

25 MR. NORVELL: Yes, sir.

1 THE COURT: You've got a separate set of
2 facts to start your motion. And I'll be trying to
3 see if I can get an agreement from the parties here.
4 Can I use all the facts and everything that's alleged
5 in your motion for summary judgment? Can I just
6 build one statement of the facts for -- and then rule
7 on both motions? Do you have any objection to that?
8 Sometimes people want to assume certain facts for
9 certain motions, and they don't want to assume for
10 others. But here I'm not hearing or seeing anything
11 like that. Do you see any problem with me using all
12 the facts and record that you've submitted with your
13 motion, and just decide the two together, create one
14 sort of statement of facts?

15 MR. NORVELL: I think I was pretty careful
16 about not making any assumptions or inconsistencies
17 wrongfully with respect to the facts, especially with
18 regard to the statute of limitations argument, which
19 again, you know, it's in the briefing. I've argued
20 every point that's in my motion, because I
21 incorporate that into my defense, statute of
22 limitations. I don't believe there are any
23 inconsistencies with my factual statements in this
24 set of briefing versus my response to motion for
25 summary judgment. So I would not have any issue with

1 incorporating all sets of facts.

2 THE COURT: So the answer is yes, you think
3 I can just take the facts from both sets of briefing?

4 MR. NORVELL: I apologize for not being
5 concise, but yeah, that's correct.

6 THE COURT: No, that's fine. I wasn't sure
7 my question was even clear. But I think you
8 understand it. All right. Thank you, Mr. Norvell.

9 Mr. Marcus.

10 MR. MARCUS: Your Honor, so if I'm
11 understanding you correctly, you're talking about
12 combining both of our facts?

13 THE COURT: What do you think? Do you see
14 any problem about that?

15 MR. NORVELL: No, not if you're going to
16 put everyone's facts, both sides together.

17 THE COURT: Then just issue an opinion on
18 this -- these two motions for summary judgment at the
19 same time. Do you see any problem with that?

20 MR. MARCUS: No, I don't think so.

21 Thank you, Your Honor.

22 All the affirmative defenses except for
23 number 15, which that was just a reservation of
24 rights, so there is no reason -- we don't have any
25 reason for it not to be stricken. But affirmative

1 defense 1, for instance, that plaintiff has failed to
2 state a claim, we would argue that, at least as far
3 as the constructive discharge is concerned, there
4 were no facts in the complaint that did support a
5 claim for constructive discharge, as we had discussed
6 earlier; that you can't base a claim for constructive
7 discharge on one action. And the complaint didn't
8 list any sort of harassment or any type of other
9 ground for constructive discharge.

10 So I would still -- we are maintaining our
11 argument that plaintiff did not state a claim for
12 constructive discharge.

13 As far as statute of limitations are
14 concerned, that was covered in our briefing, and I
15 think that was adequately argued and discussed.

16 Regarding the laches and waiver claim,
17 that's similar to my argument about -- UNM's argument
18 regarding the constructive discharge claim, that
19 plaintiff stayed at UNM for three years after he
20 was -- after he received the addendum. One day a
21 month -- he continued to come to UNM one day a month.
22 No one gave him any problems. He continued to come
23 and to show up and work under these supposedly
24 intolerable working conditions.

25 And the case law bears this out, at some

1 point you are waiving your rights. You can't just
2 stay in a job indefinitely and then claim
3 constructive discharge. If conditions are so
4 terrible, you should leave right away. So that's the
5 basis of our waiver and laches claim. It's just
6 similar to our argument regarding the constructive
7 discharge.

8 Regarding number 13, is that -- yeah, UNM
9 did act in accordance with policies and regulations.
10 There is no set policy that if a person does this,
11 this, this, and this, the person should be subjected
12 to a psychiatric evaluation. There is no way you can
13 do that. You can't do a once size fits all. This
14 type of thing has to be on a case-by-case basis. And
15 plaintiff is aware of a number of instances -- we
16 redacted names, but number of instances where other
17 employees have been required to have some sort of
18 psychological or psychiatric evaluation.

19 And UNM has substantial policies regarding
20 professionalism. And these policies say the highest
21 level of professionalism must be maintained.

22 UNM also has policies regarding disability
23 discrimination. And UNM acted in accordance with
24 those policies from the beginning, during all
25 relevant times regarding Dr. Rivero. And plaintiff

1 has not cited any evidence to the contrary, that UNM
2 violated its own policies.

3 Finally, affirmative defense number 14,
4 that's simply that UNM fulfilled any and all
5 obligations it had to plaintiff under contract or
6 statute. Well, it certainly fulfilled all
7 obligations it had to plaintiff under contract. The
8 contract was only -- plaintiff left voluntarily in
9 2007, and agreed to come back for one day a month,
10 and that's what his contract said. UNM wasn't
11 required to raise his full-time equivalent, because
12 under the contract the contract only provided for
13 .05. The plaintiff was asking for a new contract
14 essentially. So UNM was in complete compliance with
15 the contract.

16 And as far as statute, the statute is
17 concerned, the relevant statute is the Rehabilitation
18 Act. And our other affirmative defenses were that,
19 Look, plaintiff, the medical exam, the medical exam,
20 the medical inquiry, the psychiatric evaluation, that
21 that was justified by business necessity and was job
22 related. And, therefore -- and once the inquiry is
23 justified by business necessity and is job related,
24 then UNM has fulfilled all obligations it had to
25 plaintiff under the Rehabilitation Act. So that

1 affirmative defense certainly has substantial
2 evidence behind it as well.

3 Anyway, I think that's it for the
4 affirmative defenses that plaintiff wishes to be
5 stricken.

6 Thank you very much, Your Honor.

7 THE COURT: All right. Thank you,
8 Mr. Marcus.

9 Mr. Norvell, I'll give you the last word on
10 this motion.

11 MR. NORVELL: Thank you.

12 As to affirmative defense 1, you know, that
13 was failing to state a claim. It was handled at the
14 motion to dismiss stage. The defense on the merits
15 is not covered by that particular Rule 12(b)(6)
16 defense.

17 Laches and waiver was also handled by the
18 motion to dismiss. So I would ask that the Court
19 review and see that the Court overcame that at that
20 stage.

21 As to defense 13, policies and regulations,
22 Dr. Schenck at deposition admitted that he did not
23 apply any policy in presenting the addendum to Dr.
24 Rivero. There is no evidence of an application of
25 policies. There is evidence of the existence of

1 policies, but not the application of policies. And
2 that's the issue at hand here.

3 As to defense 14, I don't really have
4 anything additional to add to it, other than a simple
5 reference to other defenses defeats the purpose of
6 fairness with respect to what Dr. Rivero would seek
7 to litigate going forward.

8 Thank you, Your Honor.

9 THE COURT: All right. Thank you, Mr.
10 Norvell.

11 Well, I don't have a lot of thoughts on
12 what to do with this. I am concerned about the
13 statute of limitations issue, so I'm leaving the
14 bench inclined to think that that may present some
15 problems for the condition portion of the plaintiff's
16 claim.

17 And it's very difficult to state a
18 constructive discharge claim, so I may not merge
19 these two motions. I may just pick up the summary
20 judgment and try to get a ruling on that. Because,
21 obviously, if I grant the defendant's motion for
22 summary judgment, then a lot of this other is going
23 to be mooted out. And I do think that right at the
24 moment, the defendant's motion on those two aspects,
25 I'm inclined to think that they should be granted.

1 But I have a lot to work to do to try to master the
2 facts before I make a definitive ruling on that. But
3 those are my inclinations in leaving the bench.

4 MR. NORVELL: Your Honor?

5 THE COURT: Yes.

6 MR. NORVELL: If I may, I would ask that
7 the Court -- because for the sake of efficiency, I
8 incorporated my statute of limitations argument from
9 my motion into my response. So again, I just want to
10 emphasize, don't forget that they're both there.

11 THE COURT: Okay. I will.

12 All right. Is there anything else we need
13 to discuss while we're together? Anything else I can
14 do for you?

15 I am, like I said, going to try to get at
16 least a ruling in your hands by the end of September
17 on all these motions. So I'll try to work that in
18 before the end of September. You may not get full
19 opinions for a little bit, but I'll try to even do
20 that. That's my timeframe. And then, by the time I
21 see y'all again, I should have all my work done.

22 Anything else we need to discuss while
23 we're together? Anything else I can do for you, Mr.
24 Norvell?

25 MR. NORVELL: No. My client would just

1 like to emphasize the criticality of the access to
2 the credentialing file as part and parcel of
3 verifying the claim that would give rise to the
4 discrimination claim.

5 THE COURT: Okay.

6 MR. NORVELL: Additionally, there is a
7 retaliation claim hanging out there that was not
8 briefed, that I think still exists. So --

9 THE COURT: So you think there is another
10 claim out there?

11 MR. NORVELL: Right. It was in the
12 complaint. I made a two-sentence argument that
13 simply was not -- there was no motion by defendant to
14 strike it. It's still in the complaint. There was a
15 retaliation claim and, therefore, it should remain
16 within the case itself.

17 THE COURT: Okay. All right.

18 MR. MARCUS: Your Honor, I don't want to
19 belabor this, but I was operating under the way the
20 complaint was -- the structure of the complaint by
21 Judge Lynch, where he divided into two portions
22 appealing the illegal medical inquiry and the
23 constructive discharge. And there was no notice
24 provided to us regarding the retaliation claim.
25 Plaintiff seems to have pulled that out of thin air

1 in his response to the motion for summary judgment.

2 And, secondly, even if the complaint were
3 interpreted to contain a retaliation claim, that
4 would be clearly time-barred because the likely
5 retaliation, which was the addendum took place April
6 2011, more than five years before plaintiff brought
7 the lawsuit.

8 THE COURT: What does the pretrial order
9 say? Does it say that you have a retaliation claim,
10 or is it silent on that? What do you have on that?

11 MR. NORVELL: I think it's in dispute. I
12 think you're seeing a recitation of what's actually
13 in the pretrial order. I placed it in there. And
14 Mr. Marcus disputes --

15 THE COURT: Is there an exception to the
16 pretrial orders? Y'all went out there with a dispute
17 about what claims are in the case?

18 MR. NORVELL: It's pending determination by
19 the Court, pursuant to these motions.

20 THE COURT: Okay.

21 MR. NORVELL: It's not under the exceptions
22 heading. It's incorporated within it.

23 THE COURT: But the pretrial order -- well,
24 the motions today don't deal with the retaliation
25 claim; is that fair to say from both sides?

1 MR. NORVELL: Except to the extent that I
2 assert that there is one still out there, that's in
3 our brief.

4 MR. MARCUS: He asserted it in his
5 response, Your Honor. And we responded and got no
6 reply. It is mentioned in the brief.

7 THE COURT: Remind me what you said in your
8 reply.

9 MR. MARCUS: In the reply I said that Judge
10 Lynch's analysis of the complaint did not include a
11 retaliation claim. He divided it into two causes of
12 action, and UNM very reasonably operated using that
13 structure. So we didn't feel the need to put it in
14 the motion. However, let's assume there was a
15 retaliation claim. It was very obviously
16 time-barred, because it was more than five years
17 prior to the statute of limitations for that as well.

18 THE COURT: All right. Anything else we
19 need to discuss?

20 MR. NORVELL: Well, my client would like me
21 to once more emphasize the file itself. And if there
22 had been actual information that supported the basis
23 for the addendum, then how does that relate to the
24 statute of limitations? It likely -- he needed to
25 know what was there in order to file this claim, you

1 know, if there was negative information that would
2 have supported the psychiatric exam. So I'm simply
3 emphasizing that on his behalf.

4 And I appreciate the Court's time.

5 THE COURT: All right. Thank you, Mr.
6 Norvell.

7 Anything further, Mr. Marcus?

8 MR. MARCUS: Nothing further, Your Honor.

9 THE COURT: All right. I appreciate
10 y'all's presentations and hard work this morning.
11 I'll try to get some opinions and orders out to you.
12 Y'all have a good day.

13 (The Court stood in recess.)
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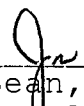
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UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
Official Court Reporter for the State of New Mexico,
do hereby certify that the foregoing pages constitute
a true transcript of proceedings had before the said
Court, held in the District of New Mexico, in the
matter therein stated.

In testimony whereof, I have hereunto set my
hand on July 5, 2018.



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